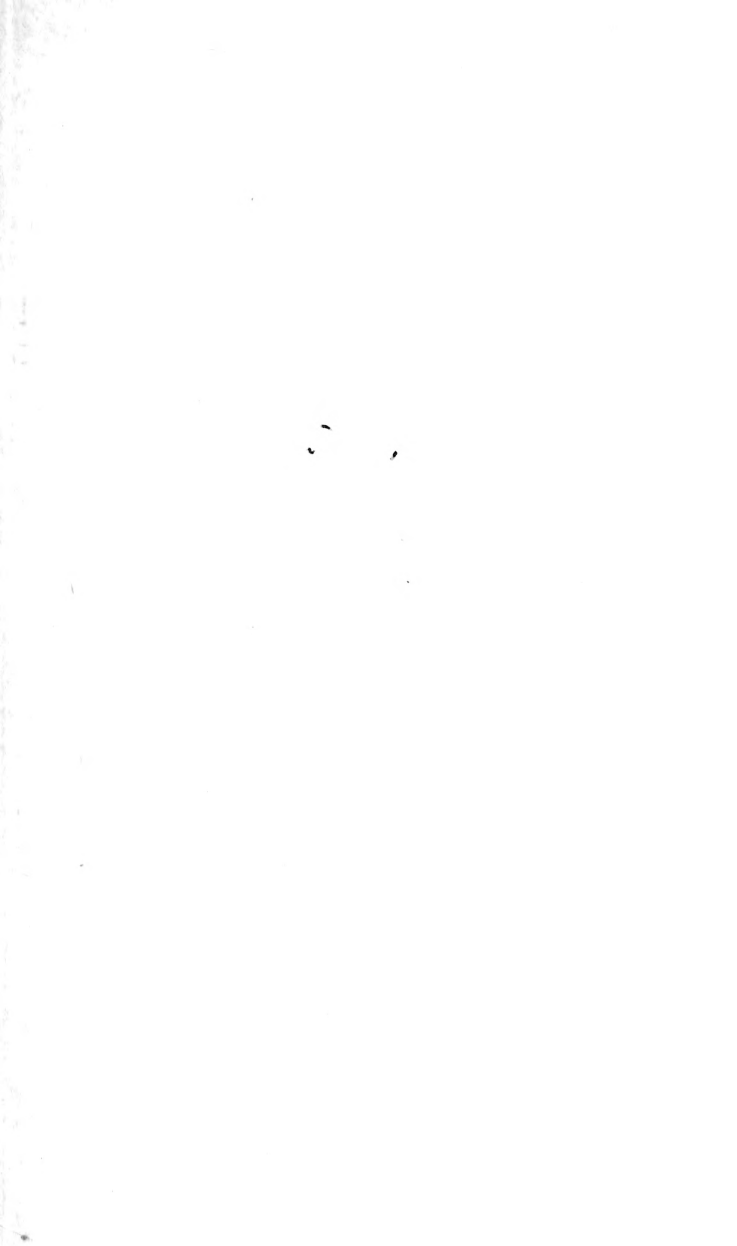


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No. 11364

United States

Circuit Court of Appeals

For the Ninth Circuit.

LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps, Commanding Of-
ficer of the United States Naval Disciplinary
Barracks, Camp Shoemaker, California,
Appellant,

vs.

EDWARD A. DRAINER,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

OCT 1 - 1946

PAUL P. O'BRIEN,

No. 11364

United States
Circuit Court of Appeals

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LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps, Commanding Of-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

FRANK J. HENNESSY, Esq.,

United States Attorney,

Northern District of California.

Post Office Building,

San Francisco, California.

Attorney for Respondent and Appellant.

WOODROW W. KITCHEL, Esq.,

1704-5 Tribune Tower,

Oakland, California.

Attorney for Petitioner and Appellee.

District Court of the United States, Northern
District of California, Southern Division

No. 25589-R

In the Matter of the Application of
EDWARD A. DRAINER, for a Writ of Habeas
Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

To The Honorable, The District Court of the United
States, Northern District of California, South-
ern Division:

The Petition of Edward A. Drainer respectfully
shows:

That the said Edward A. Drainer is unlawfully
imprisoned, detained and restrained of his liberty
by Captain E. F. Helmkamp (U. S. N.) Command-
ing Officer of the U. S. Navy Receiving Ship and
Captain Carl Benson (U. S. M. C.) in charge of
the Brig on Yerba Buena, Treasure Island in the
City and County of San Francisco, State of Cali-
fornia.

That said imprisonment, detention, confinement
and restraint are illegal and that the illegality
thereof consists in this, to wit:

That said petitioner above named was appre-
hended on November 7, 1945, in Arcata, California,
was brought to Treasure Island by the Naval Mili-
tary Authorities, was tried by a Naval Military
Court-Martial Board on Treasure Island and found
guilty of deserting the Naval Service on September

8, 1940, and by reason, therefore, is imprisoned, detained, confined and restrained on said Treasure Island. That at [1*] the time of said arrest said petitioner was a civilian and not a member of any branch of the Military Service. That the said Naval Authorities and Naval Court did not and does not have an jurisdiction over petitioner and, therefore, at this time is unlawfully detaining said petitioner, for said Naval jurisdiction ended and terminated when petitioner became separated from the Military Service by an honorable discharge which discharge took effect on or about November 1, 1944, upon the deliverance of a Certificate of Honorable Discharge from the United States Naval Service to said petitioner.

Further, said Naval Military Service and its officers and agents had no and have no jurisdiction over this petitioner and, therefore, have restrained, tried and now imprisoned and detained petitioner illegally, in that the desertion of which he was charged, tried, found guilty of, and now imprisoned for terminated on July 27, 1943, when said petitioner voluntarily re-entered the United States Naval Service, and by reason therefore, the Statute of Limitations of two years for the charge of desertion has already run out and had run out before November 7, 1945, when he was so apprehended.

That no prior application has been made for a Writ of Habeas Corpus in regard to the detention and restraint complained of in this application.

* Page numbering appearing at foot of page of original certified Transcript of Record.

Wherefore, your petitioner prays that a Writ of Habeas Corpus may be granted, directed to the said Captain E. F. Helmkamp (U. S. N.) Commanding Officer of the Receiving Ship and Captain Carl Benson (U. S. M. C.) in charge of the Brig in the City and County of San Francisco, commanding said officers and each of them to have the body of Edward A. Drainer before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning said petitioner together with time and cause of his detention and said Writ; and that he, said Edward A. Drainer, may be restored to his liberty.

Dated this 23rd day of January, 1946.

WOODROW W. KITCHEL,
Attorney.

State of California,
County of Alameda—ss.

Woodrow W. Kitchel, being duly sworn on behalf of the petitioner above named says:

That he has read the foregoing Petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true; that the said petitioner is absent from the County of Alameda, State of California, where his

attorney resides, and the facts are within the knowledge of this affiant who is the agent of the said petitioner and therefore makes this affidavit.

Dated, January 23, 1946.

WOODROW W. KITCHEL,

[Seal] RUSSELL P. STUDEBAKER,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Jan. 23, 1946.

[Title of District Court and Cause]

ORDER TO SHOW CAUSE

On reading and filing the Petition of Edward A. Drainer charging Captain E. F. Helmkamp (U. S. N.), Commanding Officer of the U. S. Navy Receiving Ship, and Captain Carl Benson (U. S. M. C.) in charge of the Brig on Yerba Buena, Treasure Island, in the City and County of San Francisco, State of California with unlawfully imprisoning, detaining and restraining said petitioner of his liberty, and sufficient cause appearing therefore, it is ordered that the said Captains Helmkamp and Benson be and appear before this Court, in open court, at the court room thereof on Monday the 28th day of January, 1946 at 2 o'clock P. M., to show cause why a Writ of Habeas Corpus should not be issued and this petitioner restored to full liberty as in said Petition requested.

It is hereby ordered that a copy of said Petition and of this order be served on the said Captains Helmkamp (U. S. N.) and Benson (U. S. M. C.) at least 3 days before said 28th day of January, 1946.

Dated this 23rd day of January, 1946.

MICHAEL J. ROCHE,

Judge of the District Court of the United States.

[Endorsed]: Filed Jan. 23, 1946.

[4]

[Title of District Court and Cause]

RETURN TO ORDER TO SHOW CAUSE

Come now Captain E. F. Helmkamp, United States Navy, Commanding Officer United States Navy Receiving Ship, and Captain Carl Benson, Captain United States Marine Corps in charge of the Brig, Yerba Buena Island, California, and Lieutenant Colonel Ernest H. Gould, United States Marine Corps, Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That Edward A. Drainer, hereinafter called "the

petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by your respondents under and by virtue of the sentence of the General Court-martial convened at the Naval Training Station and Distribution Center [5] San Francisco, California, made and entered on January 5, 1946.

II.

That attached hereto and made a part hereof as "Exhibit A" is the following:

Certified copy of the proceedings, finding and sentence of the General Court-martial in the case of Edward Arden Drainer, Private, United States Marine Corps, convened, San Francisco, California, by order of the Commandant, Twelfth Naval District and Commander Naval Operating Base, San Francisco, California.

Wherefore respondent prays that the petition for writ of habeas corpus herein be denied and the order to show cause, heretofore issued, discharged.

/s/ FRANK J. HENNESSY,

United States Attorney,
Attorney for Respondents.

EXHIBIT "A"

Department of the Navy
Office of the Judge Advocate General

BuPers

G. C. M. Endorsements

Form No. NAVJAG-273

The proceedings, findings, and sentence of the general court martial in the foregoing case of Drainer, Edward Arden, Pvt. USMC are, in the opinion of this office, legal.

Referred to the Commandant of the Marine Corps for comment as to disciplinary features.

JUDGE ADVOCATE GEN-
ERAL OF THE NAVY.

By direction

.....

290844

DGO-bjp

[Stamp]: Received 8 Feb 1946 Office of Judge Advocate General G. C. M. Section.

1st Endorsement: 7 February 1946

From: Commandant of the Marine Corps

To: The Secretary of the Navy

Returned, recommending the action indicated in item number 11.

1. Mitigate reduction in rank to reduction to the rank of

Exhibit "A"—(Continued)

2. Remit bad conduct discharge subject to months probation
 3. Remit sentence on months probation
 4. Reduce confinement with corresponding accessories to month
 5. Remit sentence entirely that accused may, as a separate and distinct action, be given an discharge, by copy of this endorsement the is authorized to discharge the accused upon receipt of letter from the Navy Department showing approval of this recommendation.
 6. Confine for a period of months in accordance with sentence and provided his conduct during the months confinement so warrants, restore to duty at expiration thereof on months probation as regards the unexecuted part of the sentence.
 7. Remit confinement with corresponding accessories except loss of pay of \$ per month for months. Total loss of pay \$
 8. In order that the sentence adjudged may be carried into effect, remit
- Adjudged by Count Martial approved
9. Concur with paragraph of Judge Advocate General's endorsement hereon, namely
 10. Approval of the proceeding, findings, and sentence

Exhibit "A"—(Continued)

11. Approval of the action taken by the convening authorities.

12. Mitigate dishonorable discharge to bad conduct discharge.

13. Remit confinement with corresponding accessories.

14. Remit reduction in rank.

15.

/s/ P. D. SHERMAN

By direction

.....

2nd Endorsement: Office of the Judge Advocate General

The Secretary of the Navy has this date approved the above recommendation.

JUDGE ADVOCATE GENERAL OF THE NAVY

By direction

.....

"Certified A True Copy."

G. R. MILLER,

Comdr. U. S. N. R.

Exhibit "A"—(Continued)

Department of the Navy
Office of the Judge Advocate General
Washington, D. C.

MM-Drainer, Edward A./A17-20

1(2-1-46) emm

4 Feb 1946

Respectfully referred to the Commandant, U. S. Marine Corps for comment as to disciplinary features with the information that, in the opinion of this office, the proceedings findings, and sentence of the general court martial in the foregoing case of Edward A. Drainer, private, U. S. Marine Corps, and the action of the convening, authority thereon, are legal.

/s/ O. S. COLCLOUGH

Judge Advocate General of
the Navy.

ND12-63-fn

A17-20

Docket No. 7876

District Staff Headquarters
Twelfth Naval District
San Francisco, California

12 January 1946

The proceedings, findings, and sentence of the general court martial in the foregoing case of Edward A. Drainer, private, U. S. Marine Corps, are approved.

The U. S. Naval Disciplinary Barracks, Naval

Exhibit "A"—(Continued)

Training and Distribution Center, Shoemaker, California, is designated as the place of confinement.

/s/ M. S. TISDALE,

Rear Admiral, U. S. Navy, Acting Commandant,
Twelfth Naval District and Commander, Naval
Operating Base.

Case of Edward A. Drainer, Private, U. S. Marine
Corps, 5 January 1946.

RECORD OF PROCEEDINGS OF A
GENERAL COURT MARTIAL

Convened at The Naval Training And Distribution
Center, San Francisco, California, By Order of
The Commandant, Twelfth Naval District, And
Commander, Naval Operating Base, San Francisco,
California.

[Stamp]: Received 28 Jan. 1946. Office of Judge
Advocate General G. C. M. Section.

Copy furnished:

Letter sent to: General Accounting Office, Audit
Division, Washington, D. C. Commanding Officer,
U. S. Naval Disciplinary Barracks, Naval Training
& Distribution Center, Shoemaker, California, Jan.
22, 1945. [10]

Exhibit "A"—(Continued)

ND12-02-ml-jsf

A17-20/A2-12

Serial 64794

District Staff Headquarters

Twelfth Naval District

San Francisco, California

19 October 1945

From: Commandant, Twelfth Naval District, and
Commander, Naval Operating Base, San Francisco,
California.

To: Captain Harry A. McClure, U. S. Navy

Subject: Precept for General Court Martial.

1. Pursuant to the authority vested in me by the Secretary of the Navy (Navy Department's File A17-11 (I)/A17-20, dated 1 July 1944), a General Court Martial is hereby ordered to convene at the U. S. Naval Training and Distribution Center, San Francisco, California, on Monday, 22 October 1945, or as soon thereafter as practicable, for the trial of such persons as may be legally brought before it:

2. The court is composed of the following seven members, any five of whom are empowered to act, viz.: Captain Harry A. McClure, U. S. Navy, Captain Charles M. Yates, U. S. Navy, Captain Samuel S. Payne, U. S. Navy; Captain Stephan B. Robinson, U. S. Navy; Captain Leslie C. McNemar, S (I), U. S. Naval Reserve; Commander Arthur F. Anderson, U. S. Navy (Retired); Lieutenant Commander

Exhibit "A"—(Continued)

Harold C. Patton, U. S. Navy (Retired), and of Lieutenant Commander James F. Coakley, S(L), U. S. Naval Reserve, Lieutenant Commander Jerome P. Herst, S(L), U. S. Naval Reserve, Lieutenant Commander Gerald E. Veltmann, (D)L, U. S. Naval Reserve, Captain David F. Condon, Jr., U. S. Marine Corps Reserve, Lieutenant Edwin S. Wilson, (D)L, U. S. Naval Reserve, Lieutenant John A. Moore, (C)L, U. S. Naval Reserve, Lieutenant (junior grade) John T. Keenan, (D)L, U. S. Naval Reserve, Lieutenant (junior grade) LeRoy R. Krein, (C)L, U. S. Naval Reserve, and Lieutenant (junior grade) Edward H. Farrell, (S), U. S. Naval Reserve, as Judge Advocates, any one of whom is authorized to act.

3. No other officers can be detailed without injury to the service.

4. This court is hereby authorized and directed to take up such cases, if any, as may be now pending before the general court martial appointed by either one of my two precepts of 3 October 1945, except such cases the trial of which may have been commenced.

5. Detachment of an officer from his ship or station does not of itself relieve him from duty as a member of judge advocate of a court. Specific orders for such relief are necessary.

6. This employment on shore duty is required by the public interests. The court is authorized to

Exhibit "A"—(Continued)

adjourn over any holiday prescribed by Article 330, Navy Regulations, 1920.

/s/ C. H. WRIGHT,

Rear Admiral, U. S. Navy Commandant, Twelfth Naval District, and Commander, Naval Operating Base.

A true copy Attest:

/s/ EDWARD H. FARRELL,

Lieutenant (jg) USNR,

Judge Advocate. [11]

A17-20

(63-br-sc)

Docket No. 7876

District Staff Headquarters
Twelfth Naval District
San Francisco, California

28 November 1945

From: Commandant, Twelfth Naval District, and Commander, Naval Operating Base, San Francisco, California.

To: Judge Advocate, General Court Martial, U. S. Naval Training and Distribution Center, San Francisco, California.

Subject: Charge and Specifications in the case of Edward A. Drainer, private, U. S. Marine Corps.

1. The above-named man will be tried before the general court martial of which you are judge

Exhibit "A"—(Continued)

advocate, upon the following charge and specification. You will notify the president of the court accordingly, inform the accused of the date for his trial, and summon all witnesses, both for the prosecution and the defense, Charge Desertion Specification.

In that Edward A. Drainer, private, U. S. Marine Corps, while so serving at the Recruit Depot, U. S. Marine Corps Base, San Diego, California, did, on or about 8 September 1940, desert from said depot, and from the U. S. naval service, and did remain a deserter until he was delivered at the U. S. Marine Barracks, Treasure Island Activities, San Francisco, California, on or about 11 November 1945.

/s/ C. H. WRIGHT,

Rear Admiral, U. S. Navy Commandant-Twelfth
Naval District and Commander Naval Oper-
ating Base. [12]

U. S. Naval Training and Distribution Center
San Francisco, California

Saturday, 5 January 1946

The court met at 10:58 a.m.

Present: Captain Harry A. McClure, U. S. Navy; Captain Charles M. Yates, U. S. Navy; Captain Samuel S. Payne, U. S. Navy; Captain Stephan B. Robinson, U. S. Navy; Captain Leslie C. McNemar, S(L), U. S. Naval Reserve; Commander Arthur F. Anderson, U. S. Navy (Retired); Lieu-

Exhibit "A"—(Continued)

tenant Commander Harold C. Patton, U. S. Navy (Retired), members; and Lieutenant (junior grade) Edward H. Farrell, U. S. Naval Reserve.

Lester D. Stout, shipfitter third class, U. S. Navy-Inductee, entered with the accused and reported as orderly.

The judge advocate introduced Boyd A. O'Brien as reporter.

The accused requested that Howard L. Martin, Lieutenant (junior grade), U. S. Naval Reserve, act as his counsel. Lieutenant (junior grade) Martin took seat as counsel for the accused.

The judge advocate submitted the precept, copy prefixed marked "A" to the accused for his information and inspection.

The accused stated that he did not object to any member.

The judge advocate, each member, and the reporter were duly sworn.

The accused stated that he received a copy of the charge and specification preferred against him on 30 December 1945.

The judge advocate asked the accused if he had any objection to make to the charge and specification.

The accused replied in the affirmative, stating that the court does not have any jurisdiction to hear this case. The court does not properly have jurisdiction on this accused. The facts being these: this accused is charged with desertion from the naval service in 1940, during the time of peace. I believe the

Exhibit "A"—(Continued)

record will show that he enlisted for a period of four years, consequently the statute of limitations would not begin to run until the end of his period of enlistment which would be done in 1944. We are not pleading limitation, the facts will be these: the accused returned to the naval service in the year 1943, on July 27th, and served in the Navy for a period of approximately fifteen months and then he was discharged honorable from U. S. Navy service, that the court has no jurisdiction over this accused. I read to the court from the Naval Courts and Boards, Section 334, in which it is provided that: "jurisdiction [13] of court martials over officers, midshipment, nurses, and enlisted men ordinarily ends when they become regularly separated from the service by acceptance of resignation or discharge. However, a discharge obtained by fraud does not oust the jurisdiction of a court martial." However, that does not apply to the case here. The accused did not obtain a discharge by fraud. The fact is there was no discharge by fraud although there may have been a fraudulent enlistment. And it further provides in the second paragraph of the same article, that is, article 334, "except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service." This accused is charged with desertion, and desertion is laid under article 8 and not under article

Exhibit "A"—(Continued)

14; and consequently since he has received an honorable discharge from the naval service, he is no longer subject to court martial.

(The judge advocate replied): If the court please, the accused enlisted on August 8, 1940, to serve for a period of four years. For this period from August 8, 1940, until he enlisted in the Navy in 1943, he gives no excuse for being absent or any reason for it. The fact that he enlisted for four years show that there was a binding contract with the Navy Department. This is getting to a point where a man, if this objection is sustained, if he chooses one branch of the service and then decides he doesn't like it, he can join another. I submit that the acceptance of the enlistment by the Navy Department of this man in the Marine Corps does not amount to a waiver from the Navy Department because of the fact there was a fraudulent enlistment. The Navy Department would have to examine this prior enlistment and when it expired. I submit the fact that he received an honorable discharge does not bar any trial of jurisdiction of this case due to the fact that the binding contract between the accused and Navy Department had not been consummated therefore the accused is before the proper court for trial.

(By the court): "What was the date of his discharge?"

(By the accused): November of 1944.

(By the court): What day was his honorable discharge?

Exhibit "A"—(Continued)

(By the accused): 1st day of November 1944.
Yes, sir, this is an honorable medical discharge.

(By the court): And when did he enlist in the Marine Corps?

(By the accused): August 8, 1940.

(By the court): The Navy enlistment was July 27th of 1943?

(By the accused): Yes, sir, and for which he was given an honorable medical discharge.

(By the court): What name did he use?

(By the accused): Same name. The name on this honorable [14] discharge is "Edward Arden Drainer."

The court was cleared.

The court was opened and all parties to the trial entered.

The court announced that the objection of the accused was overruled, and that the court found the charge and specification in the form and technically correct.

(By the accused): Does the court wish me to go forward with the evidence at this time, that I have since the development of the case.

(By the court): The evidence of what?

(By the accused): The evidence of his return to the naval service and his discharge from the U. S. Naval Reserve.

(By the court): You may continue with any part of your defense. That has no bearing whatsoever on the proceedings. Plea in bar in this trial

Exhibit "A"—(Continued)

is out. Your objection has been overruled. Proceed in this case in due form.

The accused stated he was ready for trial.

No witnesses not otherwise connected with the trial were present.

The judge advocate read the letter containing the charge and specification, original prefixed marked "B," and arraigned the accused as follows:

Q. Edward A. Drainer, private, U. S. Marine Corps, you have heard the charge and specification preferred against you; how say you to the specification of the charge, guilty or not guilty?

A. Not guilty, sir.

Q. To the charge, guilty or not guilty?

A. Not guilty, sir.

The counsel for the accused stated that the accused admitted that he was Edward A. Drainer, that he was so serving at the Recruit Depot, U. S. Marine Corps Base, San Diego, California, on or about 8 September 1940.

The accused stated that this admission was made by his authority.

The prosecution began.

The judge advocate was called as a witness for the prosecution and was duly sworn.

Examined by the Judge Advocate:

Q. State your name, rank and present station.

A. Edward H. Farrell, lieutenant (junior grade), U. S. Naval Reserve, judge advocate of this court.

Q. If you recognize the accused, state as whom.

Exhibit "A"—(Continued)

A. I do; as Edward A. Drainer, Private, U. S. Marine Corps.

Q. If you are the legal custodian of the current service record of the accused, produce it.

A. I am; here, it is.

The witness produced the current record of the accused and it was submitted to the accused and to the court and by the judge advocate offered in evidence for the purpose of reading therefrom such extracts as may pertain to the offense for which the accused is now on trial.

There being no objections, it was so received.

Q. Refer to the current service record of the accused and read therefrom any entries pertaining to the prosecution of this case.

The witness read extracts from the said record, copy appended marked "Exhibit 1."

Q. If you were the legal custodian of the letter from the headquarters, U. S. Marine Corps, Washington, D. C., in this case, produce it.

A. I am, here it is.

The witness produced the said letter and it was submitted to the accused and to the court and by the judge advocate offered in evidence for the purpose of reading therefrom such extracts as may pertain to the offense for which the accused is now on trial.

There being no objection, it was so received.

Q. Refer to that letter report from Headquarters, U. S. Marine Corps, Washington, D. C., and read therefrom any extracts pertaining to this case.

Exhibit "A"—(Continued)

The witness read extracts from the said letter, copy appended marked "Exhibit 2."

The accused did not desire to cross-examine this witness.

Neither the judge advocate, the accused nor the court desired further to examine this witness.

The witness resumed his seat as judge advocate.

The prosecution rested.

The defense began.

The accused was, at his own request, duly sworn as a witness in his own behalf.

Examined by the Judge Advocate:

Q. Are you the accused in this case?

A. Yes, sir.

Examined by the Accused:

Q. Drainer, is it correct that you stayed on duty in the Marine Corps for exactly one month? Now, answer loud and talk to the court not to me.

A. Yes, sir. [16]

Q. You enlisted in the Marine Corps on 8 August 1940?

A. Yes, sir.

4. And on 8 September 1940 you absented yourself? A. Yes, sir.

Q. You were in boot-camp were you not?

A. - Yes, sir.

Q. How old were you at that time?

A. Just turning nineteen, sir.

Q. You were eighteen and soon to be nineteen?

A. Yes, sir.

Exhibit "A"—(Continued)

Q. When you left it, did you leave in company of anyone?

A. Yes, sir, there were two of us, two or three of us.

Q. State where you intended to go at that time?

A. I was leaving, homesick. I was going to go home.

Q. Where was your home?

A. Morgantown, West Virginia.

Q. How did you start traveling home?

A. Freight train, sir.

Q. Did you ever get home on that occasion?

A. No sir.

Q. Did you go straight home?

A. No, sir.

Q. Explain to the court what happened on that trip that kept you from getting home?

A. Well, when I got in Cedar Rapids I was pretty hungry. I didn't eat for a couple of days. Another fellow, about the same age and I got pretty hungry. I guess I was too proud to beg for something to eat. Both of us broke into a store to get groceries to eat. We got caught by the policeman and put in a county jail for two or three weeks. Then we were called by the magistrate and we plead guilty.

Q. What charge did you plead guilty to?

A. Breaking and entering.

Q. Were you sentenced on that charge?

A. Yes sir. They sentenced us ten years both.

Exhibit "A"—(Continued)

Q. Where were you confined after you had been sentenced?

A. Men's reformatory. Anamosa, Iowa.

Q. How long did you stay in that reformatory under that sentence?

A. Twenty-three or twenty-four months, sir.

Q. Do you recall the date you were released from the reformatory?

A. It was in the spring of 1943. I can't exactly remember that far back.

Q. Are you sure you know that it was in the spring of 1943?

A. No, sir. It was in the late fall of 1942. Yes, sir, it was in the late fall of 1942.

Q. All right. When you were released, where did you go? A. To Des Moines, Iowa.

Q. Did you ever get to go home?

A. No, sir, I never went home. I came to California.

Q. How long did you stay in Des Moines?

A. I stay at Des Moines about three months, sir.

Q. And immediately after you stayed there three months you came to California?

A. Yes, sir.

Q. What place in California?

A. Sacramento, California.

Q. And how long did you stay in Sacramento, California?

A. I was there until about April, 1943, and then I went back home.

Exhibit "A"—(Continued)

Q. By that to your home in Morgantown, West Virginia? A. Yes, sir; I did.

Q. How long did you stay in Morgantown, West Virginia before you returned to the Naval Service?

A. I stayed home there until about the middle of April until July, about the 24th, and I went down to see if I could get into the Navy.

Q. And where did you go to enlist?

A. I went to Fairmont, and from there to Clarksburg, West Virginia, to get our examination.

Q. And did you enlist there in the Navy at Clarksburg? A. Yes, sir.

Q. Was that enlistment on the 27th of July, 1943? A. Yes, sir.

Q. Did you enlist under your own name?

A. Yes, sir.

Q. Is that under the name of Edward Arden Drainer? A. Yes, sir.

Q. Did you serve on active duty from that time of your enlistment then until you finally received a discharge from the naval service?

A. Yes, sir, I did. [18]

Q. And was that discharge on the 1st of November, 1944? A. Yes, sir.

Q. I show you here what purports to be a photostatic copy of an honorable discharge. Will you identify that instrument I hand you?

A. Yes, sir.

Q. What is it?

A. It is my discharge, sir.

Exhibit "A"—(Continued)

Q. What serial number does that discharge have on it? A. C434324, sir.

Q. Where was this honorable discharge issued to you?

A. Philadelphia, sir; Philadelphia Navy Yard.

Q. Why did you receive a medical discharge from the Navy?

A. I went down with ulcers of the stomach, sir.

The photostatic copy of the said discharge was submitted to the judge advocate and to the court and by the accused offered in evidence.

There being no objection, it was so received, appended marked "Exhibit 3".

Q. After you obtained this discharge from the Navy, where did you go?

A. I went home. On the first of November I went home. I was there for twenty-seven days. Then I left for California and I went back to northern California, where I met a girl while I was there in the Navy.

Q. Did you marry this girl and settle up there?

A. Yes, sir. April 25, 1945.

Q. Did you live at that location from that period until the time you were arrested?

A. Yes, sir.

Q. On desertion? A. Yes, sir.

Q. Did you at any time after you left boot-camp back on 8 September, 1940, intend to permanently desert the naval service?

A. No, sir, I meant to come back. I got up to Iowa, got jailed, I told them I was in the Marine

Exhibit "A"—(Continued)

Corps. They found letters from my mother. I told them what they meant. They didn't seem to pay any attention to it. We never had a trial of any sort. We went to a magistrate. And he asked us if we were guilty. That was all there was to it. And then he sentenced us.

Q. You say you hadn't had a trial, no witness or anything?

A. No, sir, no witnesses, just a magistrate. [19]

Cross-Examined by the Judge Advocate:

Q. You testified that you got homesick and you went back to West Virginia? A. Yes, sir.

Q. In other words, you made up your mind to go home? A. Yes, sir.

Q. When you left you weren't in uniform, is that correct?

A. I had military pants and shirt, that's all.

Q. When you got to that place in Iowa, what kind of clothing did you have?

A. I think just a military shirt, that's all.

Q. When you enlisted in August, 1940, you enlisted for four years, is that right. In other words, knew you had been attached to the Marine Corps until August, 1944, is that right? A. Yes, sir.

Q. When you were picked up in Iowa, you just had your military pants?

A. No, sir, just a shirt.

Q. What did you have for pants?

A. Picked up civilian pants.

Q. Any other clothing?

A. Yes, sir, I had a leather jacket.

Exhibit "A"—(Continued)

Q. So you were more or less dressed in civilian clothing, is that right? A. Yes, sir.

Q. Did you have any identification as to be in the Marine Corps?

A. All I had for identification was a letter address to my mother.

Q. Did you wear an area bar?

A. No, sir.

Q. You couldn't prove you were a Marine?

A. No, sir.

Q. When you were released from prison, did they give you the same clothing or issue you clothing? A. I received a civilian suit.

Q. And you wore that suit at the time you went back to Sacramento? A. Yes, sir.

Q. Did you consider yourself, after your release from prison, a member of the Marine Corps?

A. I don't know. We never had any lectures on about desertion. [20]

Q. I didn't ask you that. I asked you if you still considered yourself a member of the Marine Corps?

A. Yes, and no. When I left there I knew I was still connected with it but didn't know what to do.

Q. You knew you had signed until 1944?

A. Yes, sir.

Q. You knew you were still connected with the Marine Corps, but didn't know what to do, is that right? A. Yes, sir.

Q. Did you go to your own home?

Exhibit "A"—(Continued)

A. Yes, sir, in 1943.

Q. Were your parents there? A. Yes, sir.

Q. Did they know you were in the Marine Corps?

A. Yes, sir, but they didn't know very much about the service, and I told them I was connected with them, that was all.

Q. So, at that time you considered yourself a member of the Corps? A. Yes, sir.

Q. What made you enlist in the naval service?

A. I deserted in peace time. I wanted to get in the best way I could. I wanted to get back in.

Q. When you enlisted did they ask you if you had previous military service? A. Yes, sir.

Q. What did you tell them? A. No.

Q. In other words, you had a fraudulent enlistment, is that right, A. Yes, sir.

Q. After you had been apprehended by civilian authorities in California, did you ever make any attempt to square yourself with the Marine Corps?

A. Yes, sir, that's what gave me the bad stomach. I was always worried about it.

Q. Then you knew you had signed up in the Marine Corps? A. Yes, sir.

Q. Did you make any plans to straighten yourself out with the Marine Corps? A. No, sir.

Q. In other words, you figured, is this right, you received an honorable discharge from the Navy so that cancelled your obligation to the Marine Corps?

A. No, sir, I never did figure it that way. [21]

Q. What did you figure?

Exhibit "A"—(Continued)

A. I don't know, sir. I was just afraid to go back. I didn't know what would happen to me.

Q. You already had a discharge from the Navy and you knew you still had an obligation to the Marine Corps and you were afraid to go back, is that right? A. Yes, sir.

Examined by the Court:

Q. In July, 1943, when you enlisted in the Navy, you knew you were a deserter from the Marine Corps at that time? A. Yes, sir.

Q. You say you came in because you wanted to do something in the war. Why didn't you return to the Marine Corps and tell the truth at that time?

A. I was afraid if I did I would never get in the service.

Q. Well, you also stated a minute ago that you thought the ulcers were caused by your worrying about the Corps, about your Marine Corps status?

A. Yes, sir. What I meant was I thought I probably got it through the bad stomach of mine. I worried about it after I was in the Marine Corps.

Q. You worried about it since you were in the Navy?

A. Yes, sir, that's when I came down with it, overseas.

Q. If you had these ulcers when you enlisted in the Navy, why didn't you say so?

A. I was afraid I couldn't get in, that is the only excuse I had.

Q. How far did you go in school?

A. I finished the sixth grade, sir.

Exhibit "A"—(Continued)

Q. Why did you get rid of your Marine uniform immediately after you left San Diego heading east?

A. I don't know. I wanted to get home. I figured I might get caught with it somewhere.

Q. Did you ever register for the draft?

A. Yes, sir, when I got discharged from the Navy.

Q. Did you ever serve overseas on this enlistment in the Navy?

A. Yes, sir, about six months. I was on New Hebrides Island.

Q. Were you stationed there on a ship?

A. No, sir.

Q. What was your rate?

A. Seaman first class, sir. [22]

Q. You weren't in the SeaBees, were you?

A. No, sir, naval aviation.

Q. Naval Aviation? A. Yes, sir.

Re-examined by the Accused:

Q. When you enlisted in the Navy in 1943, did you make any misrepresentation of any kind with reference to your status other than your date of birth and the fact that you had no evidence of being in military service before. Those were the only two misrepresentations you made?

A. Yes, sir.

Q. What misrepresentation did you make other than your date of birth and the fact that you never had been in the service?

A. My being in jail, that is the only other one.

Q. You gave them your home address?

A. Yes, sir.

Exhibit "A"—(Continued)

Q. Your correct home? A. Yes, sir.

Q. The correct place where you had been born?

A. Yes, sir.

Q. Did they finger-print you? A. Yes, sir.

Q. Have you any idea how you happened to be picked up? A. No, sir, I don't.

Neither the accused, the judge advocate nor the court desired further to examine this witness.

The witness said that he had nothing further to state; the witness resumed his status as accused.

The defense rested.

The accused did not desire to make a statement.

The judge advocate made the following opening argument:

If the court please, in way of argument, this is probably one of the most unusual cases we have had in this court for some time. I submit the fact that the accused was patriotic in joining up in the Navy, and that he received an honorable discharge from the naval service; but I still want to call the court's attention to the fact that he knew on 8 August, 1940 when he signed up with the Marine Corps for four years that he had a binding contract with the Navy Department. The accused should therefore be found guilty as charged for desertion from the Marine Corps on or about 8 September, 1940. [23]

The accused made the following argument:

May it please the court, under the law and facts of this case, I submit the accused is not guilty of anything. It is true he left the naval service in 1940. That is in the specification, "deserted from

Exhibit "A"—(Continued)

the U.S. naval service, and did remain a deserter until he was apprehended on or about 11 November, 1945"; and yet, in fact, the clear and undisputed evidence shows that he did not remain a deserter from the naval service from that date. This is shown by the fact he came back to the Navy and served for fifteen months until receiving an honorable discharge, which is in evidence. It is this kind of case that the law stated in the Naval Courts and Boards is intended to cover. "Except for offenses provided for in article 14, A.G.N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service." Because of the fact that desertion is not a charge that is under Article 14, of A.G.N., he should no longer be held to answer to this offense with which he is charged. Now, there has been some evidence of fraudulent enlistment in this case. But the accused is not being tried on the charge of fraudulent enlistment. Certainly, he told two or three falsehoods in order to return to the naval service because he deeply regretted, he admits, the fact that he left the naval service and got himself into trouble and was put into a men's reformatory school. He came back to the naval service, when his country was in its greatest need. With the United States being in a state of war, he came back and served his country honorably and it was certainly, in my humble opinion, a return to the naval service. And under the law,

Exhibit "A"—(Continued)

this court does not have the power at this time to try the accused and legally convict him.

The judge advocate made the following closing argument:

I would like to read to the court from the revised statute, Laws Relating to the Navy, by Melling, Section 1426, under the heading of Effect of Discharge. From that I quote "A discharge from the Navy operates in bar of trial for a previous desertion from the Navy, but not in bar of a previous offense committed in the Marine Corps. They are distinct branches of the service, and a discharge from the former does not operate as a discharge from the latter."

(By the Court): What is the date of that quotation?

(By the Judge Advocate): February 20, 1912.

The trial was finished.

The court was cleared. [24]

The judge advocate was recalled and delivered to record the following findings:

The specification of the charge proved in part proved except the words "he was deliver at the U.S. Marine Barracks. Treasure Island Activities, San Francisco, California on or about 11 November, 1945", which words are not proved, and for which the court substitutes the words "on or about 27 July, 1943, when he was accepted for enlistment in the U.S. Naval Service" which words are proved.

And that the accused, Edward A. Drainer, private, U.S. Marine Corps, is of the charge guilty.

Exhibit "A"—(Continued)

The court was opened and all parties to the trial entered.

The judge advocate was recalled as a witness for the defense in matters of mitigation and was warned that the oath previously taken by him was still binding.

Examined by the Accused:

Q. Do you have in your possession at this time, as legal custodian, an official statement of honorable service in the Navy pertaining to this accused?

A. I do; here it is.

The official statement was submitted to the accused and to the court and by the judge advocate offered in evidence.

There being no objection, it was so received, original appended marked "Exhibit 4".

Q. Will you read that statement to the court.

The witness read the said statement to the court.

The judge advocate did not desire to cross-examine this witness.

Neither the accused, the judge advocate nor the court desired further to examine this witness.

The witness resumed his seat as judge advocate.

The judge advocate stated that he had no record of previous conviction, that the rate of pay of the accused is \$52.50 a month, and that he enlisted on 8 August, 1940, to serve for four years, enlistment extended by A-Nav 155-1941, and was called to active duty on the same date, and gave as his date of birth 19 October, 1921.

The court was cleared. [25]

Exhibit "A"—(Continued)

The judge advocate was recalled and directed to record the sentence of the court as follows: The court therefore sentences him, Edward A. Drainer, private, U.S. Marine Corps, to be confined for a period of eighteen (28) months, to be dishonorably discharged from the United States naval service and to suffer all the other accessories of said sentence as prescribed by section 622, Naval Courts and Boards.

H. A. McCLURE,

Captain, U.S. Navy, President.

C. M. YATES,

Captain, U.S. Navy, Member

SAMUEL S. PAYNE,

Captain, U.S. Navy, Member

STEPHAN B. ROBINSON

Captain, U.S. Navy, Member

LESLIE C. McNEMAR

Captain, S(L), U.S. Naval Reserve, Member.

ARTHUR F. ANDERSON,

Commander, U.S. Navy, Retired, Member.

HAROLD C. PATTON,

Lieutenant Commander, U. S. Navy, Retired, Member,

EDWARD H. FERRELL,

Lieutenant (junior grade), U.S. Naval Reserve, Judge Advocate.

Exhibit "A"—(Continued)

In consideration of his youth and subsequent honorable service in the Navy, we recommend Edward A. Drainer, private, U.S. Marine Corps, to the clemency of the reviewing authority.

CHARLES M. YATES,

Captain, U.S. Navy, Member

STEPHAN B. ROBINSON,

Captain, U.S. Navy, Member.

LESLIE C. McNEMAR,

Captain, S(L), U.S. Naval Reserve, Member.

HAROLD C. PATTON,

Lieutenant Commander, U.S. Navy, Retired, Member.

The court then at 12:00 adjourned until 10 a.m., until Monday, 7 January, 1946.

H. A. McCLURE

Captain, U.S. Navy, President.

EDWARD H. FARRELL,

Lieutenant (junior grade), U.S. Naval Reserve, Judge Advocate.

Exhibit "A"—(Continued)

EXHIBIT No. 1

Extract from the Current Service Record of Edward A. Drainer, Private, U.S. Marine Corps.

Page 10

19 Sep., 40 — while serving with Recruit Depot, M.C.B., San Diego, California. AWOL since 9:00 p.m., 8 Sep 40 — Not known to have disposed of effects; no secret preparations known to have been made; not known to have made any declarations, did not express desire to quit service; not known to have taken passage for a distant point; did not escape from arrest; did not commit any offense and was not in fear of punishment therefor, no secret effects of value left behind; Declared a deserter from Recruit Depot, M.C.B., San Diego, Calif. At 9:00 p.m. 8 Sep 40. Deserter Reward of \$50.00 offered, 19 September 1940.

/s/ T. M. RYAN,

Captain, U.S.M.C.

A true copy. Attest:

/s/ EDWARD H. FARRELL,

Lieutenant (junior grade), U.S. Naval Reserve,
Judge Advocate. [28]

Exhibit "A"—(Continued)

EXHIBIT No. 2

290844

DGO-362-cfv

Headquarters, U.S. Marine Corps
Washington 25 D.C.

20 November 1945

From: Director of Personnel, Marine Corps, (Discipline Division)

To: The Commanding Officer, Marine Barracks,
Treasure Island Activities, San Francisco, California.

Subject: Delivery of Private Edward Arden Drainer (290844) USMC, Deserter.

Reference: (a) your report to MARPAC serial #4681, dated 13 November 1945, same subject.

(b) Memo from Investigating Section to Discipline Division, dated 16 November 1945.

Enclosures: (3) References (a), (b) and service record book.

1. Please have Private Edward Arden Drainer, USMC, taken up on the rolls of the Marine Barracks, Treasure Island Activities, San Francisco, Calif., and take such disciplinary action as may be deemed appropriate in his case. Attention is invited to the provisions of Article 7-21, Marine Corps Manual which will be promptly complied with whenever applicable.

Exhibit "A"—(Continued)

2. The records show that this man deserted 8 September 1940, while serving with Recruit Depot, Marine Corps Base, San Diego, Calif., remaining absent until 4:00 p.m., 11 November 1945, when he was delivered at the Marine Barracks, Treasure Island, Activities, San Francisco, Calif., by the civil authorities of Humbolt County, Calif.

3. In the event the accounts of this man have been transferred to the Deserters' Roll, they will be returned or furnished by the Paymaster General of the Marine Corps.

/s/ L. T. WOLTRING,

By direction.

A true copy. Attest:

/s/ EDWARD H. FARRELL,

Lieutenant (junior grade), U. S. Naval Reserve,
Judge Advocate. [29]

EXHIBIT No. 3

C434324

Series C

HONORABLE DISCHARGE
from the United States Navy

This is to certify that Edward Arden Drainer a Seaman, First Class is Honorably Discharged from the U.S. Receiving Station, Navy Yard, Philadelphia, Pa. and from the Naval Service of the United States this 1st day of November, 1944.

Exhibit "A"—(Continued)

This certificate is awarded as a Testimonial of Fidelity and Obedience.

1 November 1944: Issued Honorable Discharge Lapel Button this date RS, NYd, Phila., Pa.

[Seal] /s/ C. M. HALL,

Captain, USN, Commanding

/s/ H. J. SHIELDS,

Comdr., USN (Ret)

NavPers 660 (Revised July 1943)

Enlisted as Apprentice Seaman 27 July 1943.

At Clarksburg, W. Va. for two (2) years.

Born 19 October 1925 at Gypsy, W. Va.

Qualification: Those of rating. Rating held, AS, S2c, S1c. Certificates None. Trade Schools completed None. Special duties for which qualified None.

Service (vessels and stations served on) or (served satisfactorily on active duty from 27 July 1943 to 1 November 1944) NRS. Clarksburg, W. Va.: NTS Great Lakes, Ill.; NavPers Dist. Cen.: Pleasanton, Cal.; RB, Shoemaker. Cal.; Utility Squadron Two; USNH, No Three; USNH, Oakland, Cal.; USNCH, Yosemite, Cal.; RS, NYd, Phila., Pa.

Rating at discharge: S1c

(Service Number): 755 86 05.

Exhibit "A"—(Continued)

Character of service: Excellent.

Final average: 3.75.

/s/ H. J. SHIELDS,
Commander, USN (Ret) and
Executive Officer.

Height: 5 ft 7 in. Weight: 145 lb. Eyes: Blue.
Hair: Blonde. Complexion: Ruddy. Personal
marks, etc.: VS on left arm, Ps on back, S1½" on
left knee.

Is physically qualified for discharge. Requires
treatment but not hospitalization.

I certify that this the the actual print of the
right index finger of the man herein mentioned.

/s/ J. P. BOWLES,
Capt. (MC) USN and Medi-
cal Officer.

Monthly rate of pay when discharged: \$66.00.

I hereby certify that the within named man has
been furnished travel allowance at the rate of .05
cents per mile from Phila. Pa. to Fairmont, W. Va.
and paid \$91.42 in full to date of discharge.

Total net service for pay purposes: 01 years, 03
months, 04 days.

Edward A. Drainer
(Signature of man)

/s/ GEO. M. LANDERS,
APC, USN. Ret. and Disbursing Officer for Fred
C. Burris, Lieut. (SC) USNR.

Exhibit "A"—(Continued)

State of West Virginia

Monongalia County, To Wit:

I, A. R. Martin, Clerk of the County Court of the County aforesaid do certify that the aforesaid writing; together with the certificates and \$ none cancelled Internal Revenue Stamps, thereto attached was this day presented to me in my office, and was admitted to record therein at 1:18 o'clock p.m.

Given under my hand this 2nd day of November, 1944:

A. R. MARTIN,
Clerk.

Paid Mop \$100.00, 1/11/44 C. W. Palmer, APC
USN Ret For Fred C. Burris, Lieut SC USNR

[Stamp]: Received Nov. 2 18 PM '44, County
Clerk, Monongalia Co.

EXHIBIT No. 4

Department of the Navy
Bureau of Naval Personnel
Washington 25, D.C.

CERTIFICATE

(For use in Naval courts martial, See Sec. 196,
Naval Courts and Boards.)

I hereby certify that the attached is a true statement of service of Edward Arden Drainer, as shown by the records, on file in this Bureau.

Exhibit "A"—(Continued)

In Witness Whereof. I have hereunto set my hand and caused the Seal of the Bureau of Naval Personnel to be affixed this 20th day of December, one thousand nine hundred and forty-five.

[Seal]

LOUIS DENFELD,

Chief of Naval Personnel.

NavPers-2096

Statement of service of Edward Arden Drainer, ex-S1c, USNR: Drainer enlisted in the Naval Reserve 27 July 1943 for two years. He served with a clear record until November 1944 when he was honorably discharged by reason of Medical Survey. On Discharge he received an average final mark of 3.75.

U. S. Naval Training and
Distribution Center
San Francisco, California.

Tuesday, 8 January 1946.

I hereby acknowledge the receipts of a copy of the record of proceedings of my trial by general court martial held 5 January 1946.

/s/ EDWARD A. DRAINER,

Private, USMC.

[Endorsed]: Filed Feb. 25, 1946. [37]

[Title of District Court and Cause.]

ANSWER TO RETURN TO ORDER
TO SHOW CAUSE

Comes now Edward A. Drainer, the petitioner herein, and for his reply to the Answer of said respondents in this cause filed denies, each and every, all and singular, generally and specifically, the allegations contained therein.

And for a second and further reply to the said Answer this petitioner alleges that said United States Naval Service had no jurisdiction over this petitioner at the time of the convening of the General Court-Martial referred to in said Return in that said petitioner on the first day of November, 1944 received an honorable discharge from the Naval Service of the United States at Philadelphia, Pennsylvania.

And for a third and further reply to the said Answer this petitioner alleges that the Statute of Limitations had already run on the cause for which petitioner was apprehended on November 7, 1945.

By reason whereof all the proceedings, acts and things done in restraining and depriving this petitioner of his liberty and his present imprisonment were and are wholly [38] illegal, unauthorized and void; and these are the same acts, judgments, orders, and proceedings as are mentioned and alleged in the said Answer.

Wherefore, petitioner prays a Writ of Habeas Corpus may be granted and said Edward A. Drainer

may be restored to his liberty as set forth in the Petition on file herein.

WOODROW W. KITCHEL,

Attorney For Petitioner.

State of California,
County of Alameda—ss.

Woodrow W. Kitchel, being first duly sworn, deposes and says:

That he is the attorney for the petitioner in the above-entitled action and matter and makes this verification for and on behalf of petitioner for the reason that petitioner is without the City of Oakland wherein affiant maintains his law office;

That he has read the foregoing Answer To Return To Order To Show Cause and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information and belief, and as to those matters he believes it to be true.

WOODROW W. KITCHEL

Subscribed and sworn to before me this 28th day of February, 1946.

[Seal] FRED B. MELLMANN,

Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Mar. 4, 1946. [39]

[Title of District Court and Cause.]

Application for a writ of habeas corpus. Writ granted and petitioner discharged from custody in accordance with opinion.

Woodrow W. Kitchel of Oakland, California, attorney for petitioner.

Frank J. Hennessy, United States Attorney, and Joseph Karesh, Assistant United States Attorney, both of San Francisco, California, attorneys for respondent.

MEMORANDUM OPINION

Roche, District Judge: This is an application for writ of habeas corpus whereby the petitioner, Edward A. Drainer, seeks to be released from imprisonment by the United States Naval Authorities. The imprisonment is pursuant to sentence by General Court Martial on the charge of desertion from the U.S. Naval Service. In his petition Drainer alleges lack of jurisdiction [40] on the ground that at the time of his arrest by civilian authorities and trial he had been separated from the military service by an honorable discharge and further, that the prosecution was barred by the two year statute of limitations. The record discloses the following facts:

On August 8, 1940, Drainer, then 18 years old, enlisted in the U.S. Marine Corps at Des Moines Iowa, for a period of four years. He was sent to San Diego, California, for training and after serving one month he absented himself without leave.

He was thereupon declared a deserter as of September 8, 1940.

It appears from his testimony before the Court Martial Board that he left because he was homesick and wanted to return to his home in West Virginia; that he got as far as Cedar Rapids, Iowa, by riding freight trains; that he was hungry and without funds; that in order to get food he and his companion broke the window of a grocery store, that they were arrested, charged with breaking and entering and sentenced to the reformatory, from which Drainer was released after serving two years. He further testified that after his release he spent several months in Sacramento, California, and then visited his family in West Virginia. By this time the United States was at war and the petitioner, who had left his country's service in time of peace, was anxious to return.

Accordingly, on July 27, 1943, the petitioner, now being 21 years of age, voluntarily enlisted in the U. S. Navy at Clarksburg, West Virginia. In so enlisting, he gave his true name and address but gave his age as 17, in order to avoid the problem of not having a draft registration card, and failed to disclose his prior military service. While this might constitute a fraudulent enlistment, it was no part of the specification on which the petitioner was tried.

On November 1, 1944, after almost a year and a half of honorable service, eight months of which was spent overseas in the South Pacific Area, peti-

tioner was given an Honorable Medical [41] Discharge from the U. S. Naval Service.

On November 7, 1945, petitioner, now a married man and regularly employed in Arcata, California, was apprehended by civilian authorities, returned to Treasure Island, tried and found guilty of desertion from the U. S. Naval Service during the period from September 8, 1940, to July 27, 1943. He was sentenced to eighteen months imprisonment at the conclusion of which he shall receive a Dishonorable Discharge from the United States Naval Service.

The question is whether a civilian, regularly separated from the service, can be tried by Court Martial for a desertion committed prior to his receipt of an Honorable Discharge.

It is the general rule that a person is amenable to the military jurisdiction only during the period of his service. *U.S. v. McDonald*, 265 Fed. 695; *Naval Courts and Boards*, Section 334 at page 92; *Winthrop, Military Law and Precedence*, 2nd Ed. (1920) at page 89. And once honorably discharged, such Honorable Discharge is a "formal, final judgment passed by the government upon the entire military record" of the person. *U. S. v. Kelly*, 82 U.S. 36.

That an Honorable Discharge from the U. S. Naval Service would not be a "formal, final judgment" upon the person's service record with the Army is, of course, true. They are two separate and distinct branches of the military service, each with its own

Secretary as administrative head. The U.S. Marine Corps, however, is not a separate branch of the service. It is a part of the Navy and is, by statute, made subject to the laws and regulations of the U.S. Navy. 34 U.S.C.A. 715. In *U.S. v. Dunn*, 120 U.S. 249, the Supreme Court considered the status of the Marine Corps and held that it was a part of the Naval Service and that service by an officer of the Navy as an enlisted man in the Marine Corps was to be credited to him in calculating his longevity pay.

It will be noted that the petitioner was not charged with desertion from the Marine Corps. He was charged with [42] desertion from the U.S. Naval Service. On July 27, 1943, he enlisted in the U.S. Naval Service. On November 1, 1944, he was honorably discharged from the U.S. Naval Service.

If respondent's contention that the Marine Corps is a separate branch of the service is correct, then the Court Martial Board had no jurisdiction to try petitioner on a charge of desertion from the U.S. Naval Service. If respondent's contention is not correct, prosecution for desertion from the U.S. Naval Service after petitioner had received an Honorable Discharge from the U.S. Naval Service is barred by such Honorable Discharge.

In support of his contention the respondent relies primarily on the decisions of the Judge Advocate General, citing Melling's "Law Relating to the Navy", and argues that an administration interpretation of the statute is entitled to great weight in the courts. This is true, but an interpretation that

is not required by the statute itself nor supported by judicial decision fails to carry the same weight. Such an interpretation is not binding on the Court.

Wherefore, the petition for a writ of habeas corpus will be granted and the petitioner will be discharged; but pending an appeal from the decision of this court he shall be enlarged upon recognizance with surety in the sum of \$100.00 for appearance to answer the judgment of the appellate court, in accordance with Rule 29 of the Rules of Court for the Ninth Circuit.

Dated: April 16, 1946.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Apr. 16, 1946. [43]

[Title of District Court and Cause.]

ON HABEAS CORPUS

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here Ordered that the said named person in whose behalf the Writ of Habeas Corpus was sued out is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from

which he has been produced, and that he go hence without delay.

Entered this 16th day of April, 1946.

[Seal] C. W. CALBREATH,
 Clerk.

(Return of Service of Writ attached.)

[Endorsed]: Filed Apr. 25, 1946. [44]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS.

Notice is hereby given that Lieutenant Colonel Ernest H. Gould, United States Marine Corps Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California, the respondent in the above-entitled proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order and opinion of the Honorable Michael J. Roche, United States District Judge for the Northern District of California, discharging the petitioner, made and entered in the above-entitled action on April 16, 1946.

/s/ FRANK J. HENNESSY,
 United States Attorney,

/s/ JOSEPH KARESH,
 Assistant United States At-
 torney,
 Attorneys for Respondent.

[Endorsed]: Filed Apr. 17, 1946. [46]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including July 6, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: May 27, 1946.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed May 27, 1946. [47]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 47 pages, numbering from 1 to 47, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of the Application of Edward A. Drainer for a Writ of Habeas Corpus No. 25589 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of \$18.00 and that the said amount has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 25th day of June, A.D. 1946.

C. W. CALBREATH,
Clerk.

[Seal] M. E. VAN BUREN
Deputy Clerk.

[Endorsed]: No. 11364. United States Circuit Court of Appeals for the Ninth Circuit. Lieutenant Colonel Ernest H. Gould, United States Marine Corps., Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California, Appellant, vs. Edward A. Drainer, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 25, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11,364

LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps., Commanding Of-
ficer United States Naval Disciplinary Bar-
racks, Camp Shoemaker, California,
Appellant,

vs.

EDWARD H. DRAINER,
Appellee.

STATEMENT OF POINTS TO BE RELIED
ON IN APPEAL AND DESIGNATION OF
CONTENTS OF RECORD TO BE
PRINTED

Lieutenant Colonel Ernest H. Gould, United States Marine Corps, Commanding Officer of the United States Naval Disciplinary Barracks, Camp Shoemaker, California, appellant herein, designates the entire record filed with this Court as necessary for the consideration of the appeal, and the following constitute the points to be relied upon by him on appeal:

(1) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have denied the petition for writ of habeas corpus filed by appellee before him;

(2) That the Honorable Michael J. Roche, United States District Judge for the Northern

District of California, erred when he ordered the appellee discharged from the custody of the appellant;

(3) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have held that a deserter from the United States Marine Corps, who fraudulently enlists in the United States Navy, is amenable to prosecution for his desertion from the United States Marine Corps;

(4) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred in holding that the United States Naval authorities and Naval Court had no jurisdiction over the person of the appellee;

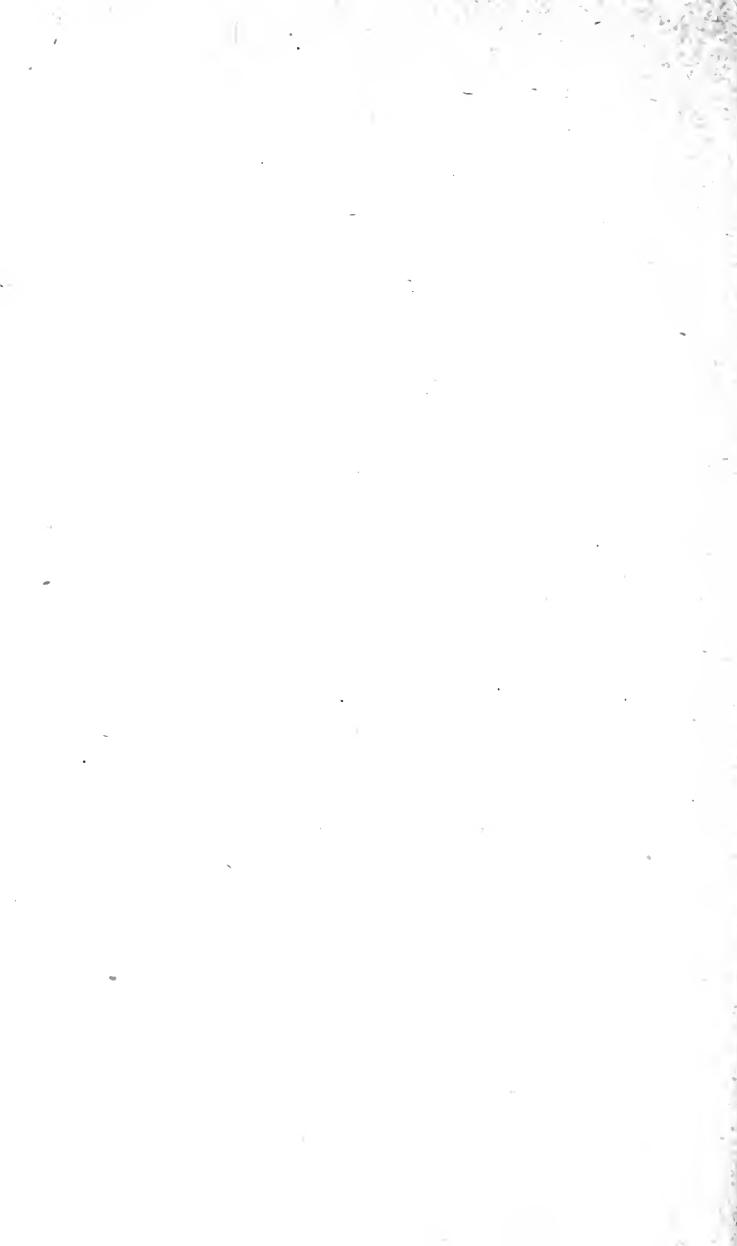
(5) That the sentence imposed against the appellee by the General Court Martial convened at the Naval Training Station and Distribution Center, San Francisco, California, on January 5, 1946, is a valid existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant.

Dated: July 3, 1946.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States At-
torney,
Attorneys for Appellant.

[Endorsed]: Filed July 2, 1946. Paul P. O'Brien,
Clerk.



No. 11,364

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps, Command-
ing Officer of the United States Naval
Disciplinary Barracks, Camp Shoemaker,
California,

Appellant,

VS.

EDWARD A. DRAINER,

Appellee.

OPENING BRIEF FOR APPELLANT.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellant.

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No. 11,364

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps, Command-
ing Officer of the United States Naval
Disciplinary Barracks, Camp Shoemaker,
California,

Appellant,

VS.

EDWARD A. DRAINER,

Appellee.

OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below" discharging appellee from the custody of the appellant. (Tr. 48-53.) The Court below had jurisdiction of the habeas corpus proceedings under the provisions of Title 28 U.S.C.A., Sections 451 to 461 inclusive. Jurisdiction to review the order of the Court below is conferred upon this Court by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF FACTS.

This is an appeal from an order of the Court below discharging appellee from the custody of appellant, Lieutenant Colonel Ernest H. Gould, United States Marine Corps, Commanding Officer of the United States Disciplinary Barracks, Camp Shoemaker, California. The facts which are undisputed reveal that appellee enlisted in the United States Marine Corps on August 8, 1940, at Des Moines, Iowa, for a period of four years. From there he was sent to the Marine Base at San Diego, California, for training, where, after serving one month, he deserted, being declared a deserter from the Marine Corps as of September 8, 1940. He then proceeded to return to his home at Morgantown, West Virginia, but after getting as far as Cedar Rapids, Iowa, he and a companion were arrested for breaking and entering a grocery store. For this offense he was sentenced to serve ten years in the Men's Reformatory in Iowa. However, he was released in the Fall of 1942, after having served approximately two years. On July 27, 1943, almost a year later, appellee enlisted in the United States Navy at Clarksburg, West Virginia, concealing his prior enlistment and desertion from the Marine Corps and giving his age as seventeen, in order to avoid the problem of not having a draft card.

On November 1, 1944, after fifteen months in the Navy, eight of which were served in the South Pacific area, appellee was given an honorable medical discharge from the Navy at the Philadelphia Navy Yard, Philadelphia. At the time of the issuance of this

discharge the Navy authorities were still unaware of his desertion from the Marine Corps.

On November 7, 1945, appellee was arrested by civilian authorities and returned to the Navy Base at Treasure Island, California, where he was tried by the Navy Court-martial for deserting the Marine Corps during the period September 8, 1940 to July 17, 1943. He was found guilty and sentenced to serve eighteen months imprisonment, at the conclusion of which he was to receive a dishonorable discharge from the service. Immediately thereafter he was transferred to Camp Shoemaker, California, into the custody of the appellant. Appellee then petitioned the Court below for a writ of habeas corpus, claiming that the naval authorities and naval court had no jurisdiction over him since he had been honorably discharged from that service on November 1, 1944. The Court below, which heard the cause, sustained appellee's contention, ordered him released from custody and entered the following memorandum opinion:

“Roche, District Judge: This is an application for writ of habeas corpus whereby the petitioner, Edward A. Drainer, seeks to be released from imprisonment by the United States Naval Authorities. The imprisonment is pursuant to sentence by General Court Martial on the charge of desertion from the U. S. Naval Service. In his petition Drainer alleges lack of jurisdiction on the ground that at the time of his arrest by civilian authorities and trial he had been separated from the military service by an honorable dis-

charge and further, that the prosecution was barred by the two year statute of limitations. The record discloses the following facts:

On August 8, 1940, Drainer, then 18 years old, enlisted in the U. S. Marine Corps at Des Moines, Iowa, for a period of four years. He was sent to San Diego, California, for training and after serving one month he absented himself without leave. He was thereupon declared a deserter as of September 8, 1940.

It appears from his testimony before the Court Martial Board that he left because he was homesick and wanted to return to his home in West Virginia; that he got as far as Cedar Rapids, Iowa, by riding freight trains; that he was hungry and without funds; that in order to get food he and his companion broke the window of a grocery store, that they were arrested, charged with breaking and entering and sentenced to the reformatory, from which Drainer was released after serving two years. He further testified that after his release he spent several months in Sacramento, California, and then visited his family in West Virginia. By this time the United States was at war and the petitioner, who had left his country's service in time of peace, was anxious to return.

Accordingly, on July 27, 1943, the petitioner, now being 21 years of age, voluntarily enlisted in the U. S. Navy at Clarksburg, West Virginia. In so enlisting, he gave his true name and address but gave his age as 17, in order to avoid the problem of not having a draft registration card, and failed to disclose his prior military service.

While this might constitute a fraudulent enlistment, it was no part of the specification on which the petitioner was tried.

On November 1, 1944, after almost a year and a half of honorable service, eight months of which was spent overseas in the South Pacific Area, petitioner was given an Honorable Medical Discharge from the U. S. Naval Service.

On November 7, 1945, petitioner, now a married man and regularly employed in Arcata, California, was apprehended by civilian authorities, returned to Treasure Island, tried and found guilty of desertion from the U. S. Naval Service during the period from September 8, 1940, to July 27, 1943. He was sentenced to eighteen months imprisonment at the conclusion of which he shall receive a Dishonorable Discharge from the United States Naval Service.

The question is whether a civilian, regularly separated from the service, can be tried by Court Martial for a desertion committed prior to his receipt of an Honorable Discharge.

It is the general rule that a person is amenable to the military jurisdiction only during the period of his service. *U. S. v. McDonald*, 265 Fed. 695; Naval Courts and Boards, Section 334 at page 92; Winthrop, *Military Law and Precedents*, 2nd Ed. (1920) at page 89. And once honorably discharged, such Honorable Discharge is a 'formal, final judgment passed by the government upon the entire military record' of the person. *U. S. v. Kelly*, 82 U. S. 36.

That an Honorable Discharge from the U. S. Naval Service would not be a 'formal, final judg-

ment' upon the person's service record with the Army is, of course, true. They are two separate and distinct branches of the military service, each with its own Secretary as administrative head. The U. S. Marine Corps, however, is not a separate branch of the service. It is a part of the Navy and is, by statute, made subject to the laws and regulations of the U. S. Navy. 34 U.S.C.A. 715. In *U. S. v. Dunn*, 120 U. S. 249, the Supreme Court considered the status of the Marine Corps and held that it was a part of the Naval Service and that service by an officer of the Navy as an enlisted man in the Marine Corps was to be credited to him in calculating his longevity pay.

It will be noted that the petitioner was not charged with desertion from the Marine Corps. He was charged with desertion from the U. S. Naval Service. On July 27, 1943, he enlisted in the U. S. Naval Service. On November 1, 1944, he was honorably discharged from the U. S. Naval Service.

If respondent's contention that the Marine Corps is a separate branch of the service is correct, then the Court Martial Board had no jurisdiction to try petitioner on a charge of desertion from the U. S. Naval Service. If respondent's contention is not correct, prosecution for desertion from the U. S. Naval Service after petitioner had received an Honorable Discharge from the U. S. Naval Service is barred by such Honorable Discharge.

In support of his contention the respondent relies primarily on the decisions of the Judge Advocate General, citing Melling's 'Law Relating

to the Navy', and argues that an administration interpretation of the statute is entitled to great weight in the courts. This is true, but an interpretation that is not required by the statute itself nor supported by judicial decision fails to carry the same weight. Such an interpretation is not binding on the Court.

Wherefore, the petition for a writ of habeas corpus will be granted and the petitioner will be discharged; but pending an appeal from the decision of this court he shall be enlarged upon recognizance with surety in the sum of \$100.00 for appearance to answer the judgment of the appellate court, in accordance with Rule 29 of the Rules of Court for the Ninth Circuit.

Dated: April 16, 1946." (Tr. 48-52.)

From the order discharging the appellee from his custody the appellant appeals to this Honorable Court. (Tr. 53.)

CONTENTIONS OF APPELLANT.

The five points designated by the appellant as the grounds to be relied on by him on appeal are as follows:

"(1) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have denied the petition for writ of habeas corpus filed by appellee before him;

(2) That the Honorable Michael J. Roche, United States District Judge for the Northern

District of California, erred when he ordered the appellee discharged from the custody of the appellant;

(3) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have held that a deserter from the United States Marine Corps, who fraudulently enlists in the United States Navy, is amenable to prosecution for his desertion from the United States Marine Corps;

(4) That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred in holding that the United States Naval authorities and Naval Court had no jurisdiction over the person of the appellee;

(5) That the sentence imposed against the appellee by the General Court Martial convened at the Naval Training Station and Distribution Center, San Francisco, California, on January 5, 1946, is a valid existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant." (Tr. 56, 57.)

QUESTION PRESENTED.

Is a deserter from the Marine Corps, who fraudulently enlists in the Navy and receives an honorable discharge therefrom, amenable to prosecution for his desertion from the Marine Corps?

ARGUMENT.

From the memorandum opinion filed by the Court below, it appears that its ruling was based primarily on the decision in the case of

United States v. Kelly, 82 U. S. 34,
which holds that

“An honorable discharge is a formal final judgment passed by the Government upon the entire military record” of the person.

Appellant respectfully asserts that he does not believe the *Kelly* case is applicable. In that case Kelly deserted while serving in the United States Army but returned and was restored to duty by order of his Department Commander, without trial, on condition that he make good the time lost (about two months). Kelly complied with the condition and was honorably discharged at the expiration of his term of service. Subsequently Kelly claimed to be entitled to bounty money but the claim was denied by the Pay Department because of the charge of desertion on his service record. Kelly brought an action in the Court of Claims and that Court ruled that he was entitled to the money. The Government appealed. In its opinion the Supreme Court stated:

“We do not think that under the circumstances of the present case the bounty was forfeited. The able lawyer who fills at present the post of Judge Advocate General, in a case similar to the present, held that ‘the honorable discharge of the deserter was a formal final judgment passed by the Government upon the entire military record of the soldier and an authoritative declaration by

it that he had left the service in a status of honor.' That as such it dispensed altogether with the supposed necessity that the soldier must obtain bounty by removal, by order, of the charge of desertion from the rolls, and amounted of itself to the removal of any charge or impediment in the way of his receiving bounty. With this opinion we entirely concur."

As seen by the foregoing and our several important distinctions between the *Kelly* case and the instant one, the principal question presented in the *Kelly* case was whether a soldier who fulfilled the terms of a single enlistment was entitled to bounty money. There was no fraud or deception on the part of Kelly. On the contrary, the Army authorities were fully cognizant of his desertion when they permitted him to return to duty and serve out the remainder of his enlistment. That this is accepted military procedure where there is a single enlistment, is shown by the following excerpt from Winthrop's *Military Law and Precedents*, Second Edition, Vols. 1 and 2, page 651:

"It is declared by par. 127, Army Regulations, that a deserter, when returned to the proper command to make good the time due by him to the United States, 'will be considered as again in service'. While thus serving he will occupy in his military relations the same status as that of any soldier in good standing, except in so far as his rights to pay or allowances may have been divested by a forfeiture of pay, etc., 'to become due,' contained in his sentence. Otherwise he is to be paid, subsisted, etc., as well as treated in general, like any other soldier. He is

not in arrest, and is not to be discriminated against because of having been a deserter. His discharge at the end of his service will be an honorable one in law, though it may properly state the circumstances under which it is given."

But in the instant case the petitioner wilfully and purposely concealed his prior enlistment and desertion from the Marine Corps when he enlisted in the Navy. Had the Navy authorities been informed of the true facts, it is certain that they would not have permitted him to enlist but would have turned him over to the Marine Corps for proper disciplinary action. The suppression of the true facts constituted a fraud upon the Government. It follows that he should not be permitted to benefit by his own fraud.

In re Grimley, 137 U. S. 147.

Furthermore in the *Kelly* case there was but a single enlistment from which an honorable discharge was received, while in the instant case there are two separate and distinct enlistments, only one of which has been terminated. An enlistment is essentially a contract. In discussing the contractual relationship created by enlistment in the armed forces the Court in *In re Grimley, supra*, stated:

"This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The government, as contracting party, offers contract and service. Grimley accepts such contract declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifications

* * * Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the law of contracts. * * * But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. * * * In other words, it is a general rule accompanying a change of status, that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof. * * * By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into new relations with him or permitted him to change his status. * * * No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States."

Concerning the reenlisting of a soldier in the same branch of the service without having obtained a discharge from a prior enlistment, *Winthrop's Military Law and Precedents*, Second Edition, Vols. 1 and 2, has this to say on pages 652 and 653:

“REENLISTING WITHOUT A REGULAR DISCHARGE. Art. 4, as has been seen, prescribes in what manner and form a soldier shall be discharged, and the present Article in effect declares that a soldier who assumes to discharge HIMSELF from his proper regiment, etc., i. e. to leave it ‘without a regular discharge’, and enlist in another, does so at the peril of being treated as a deserter. It is to be construed, however, not as creating an offense distinct from the desertion made punishable by Art. 47, but as indicating a specific form of such offense, or rather as declaring that the act of reenlisting under the circumstances described shall constitute PROOF OF DESERTION on the part of the soldier. The object of the provision evidently was to preclude the notion that a soldier could be relieved from liability to reenter the service in another, or in other words, that he could be excused from repudiating his pending contract by substituting another in its place.”

In the memorandum opinion filed in this case the Court below acknowledges that an honorable discharge from the United States Naval Service would not be a “formal final judgment” upon the person’s service record with the Army but states that this does not apply to the instant case since the United States Marine Corps is not a separate branch of the service

but is a part of the Navy. Actually the Marine Corps occupies a position intermediate in some respects between the Army and Navy and to some extent is an independent organization.

In re Doyle, 18 Fed. 369.

In *Walton v. United States*, 31 Ct. Cl. 196, 200, the Court held that

“The Marine Corps, though a distinct organization from the Army or Navy, is nevertheless subject to the laws and regulations for the government of the Navy ‘except when detached for service with the Army, by order of the President’ in which case they shall be subject to the rules and Articles of War prescribed for the government of the Army”.

In 19 *Op. Atty. Gen.* 618, it is stated

“The military establishment of the United States consists of three principal organizations, the Army, the Navy and the Marine Corps. Each has an organization distinct from that of the others, as plainly appears in the Revised Statutes and each is the object of a distinct annual appropriation by Congress”.

On several occasions Congress has acknowledged the fact that the receipt of an honorable discharge does not automatically cancel a charge of desertion pending against a member of the Navy or Marine Corps, and in those instances where it was believed justifiable has deemed it necessary to reenact legislation to have this accomplished. Thus, the first session of the 50th Congress enacted a Bill which under certain conditions authorized the Secretary of the Navy to remove the

charge of desertion standing on the rolls or records of the Navy or Marine Corps against any appointed or enlisted man of the Navy or Marine Corps who served during the Civil War.

See

Sections 1012 to 1014, Title 34 *U.S.C.A.*

For similar sections pertaining to the Army see

Sections 1434 to 1441 inc. of Title 10 *U.S.C.A.*

In approving the adoption of this Bill, the Committee on Naval Affairs embodied in its report the following quotation from the report of the Committee on Military Affairs of the 47th Congress:

“ * * * The second section of the proposed substitute is intended by your Committee to relieve another class of soldiers who, having absented themselves from their commands, or deserted, after such desertion or absence without leave, voluntarily returned to their commands, and were either tried by court martial and punished and restored to the rolls of their commands, or were restored without punishment, and who served afterwards until regularly mustered out of the service and received a regular certificate of discharge. * * * In such cases your Committee are of the opinion that the charge of desertion should be removed, and that in all cases where a soldier absented himself from his command and voluntarily returned to the same, and paid the penalty of such offense, or the offense was not sufficient to require any punishment, and then served until regularly mustered out and received regular discharge, should have the charge of desertion removed.”

See

Page 1035, *Congressional Record*, 50th Congress, 1st Sess. February 7, 1888.

A similar bill was enacted by the 68th Congress, 2nd Sess., authorizing the President to remove the charge of desertion from the records of members of the Navy and Marine Corps who served during the First World War. See

Section 1017, Title 34 *U.S.C.A.*

Speaking against an amendment to this bill proposed by Congressman Huddleston of Alabama, which would make eligible to compensation under the Compensation Acts those who served honorably during the First World War and who were honorably discharged and subsequently enlisted and deserted, Congressman Butler, who introduced the bill, stated:

“I could not agree with my friend from Alabama that for all time to come we should excuse these military men of the charge of desertion because they happened to have military service. We thought this Congress would be generous by taking this blemish from their records. But I have never heard it suggested that for all time in the future men who commit desertion may be forgiven automatically without the intervention of the authority of Congress simply because of the fact they had service in the World War. * * * Mr. Chairman I will ask the committee not to adopt the amendment of my friend. It is new to me. But if I thought about it for a week I do not think I could agree to adopt an amendment that for all time to come would excuse the offense of desertion.”

See

Page 415, *Congressional Record*, 68th Congress, 2nd Sess., December 10, 1924.

Furthermore Congress provided a different law for enlistments in the Navy and Marine Corps.

Section 181, Title 34 *U.S.C.A.*

relates to enlistments in the Navy while

Section 692, Title 34 *U.S.C.A.*

provides for enlistments in the Marine Corps.

Section 1011, Title 34 *U.S.C.A.*

provides for the arrest of deserters from the Navy or Marine Corps.

In

Section 183, Title 34 *U.S.C.A.*

it is stated as follows:

“An enlistment in the Navy or Marine Corps shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of injury, sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct”.

Thus it is clear that Congress intended the Navy and Marine Corps to be separate branches of the service in regard to enlistments and desertions. And enlistment in the Navy after a desertion from the Marine Corps is not a return to the Marine Corps, and a discharge from one branch of the service cannot be applied to the other service, even though the Secretary of the Navy is authorized to grant honorable discharges “to all enlisted persons in the Navy”.

Sections 192, 193, Title 34 *U.S.C.A.*

Such honorable discharges are granted "according to a form prescribed by the Secretary of the Navy". The Secretary of the Navy has designated different forms for the Navy and the Marine Corps.

It should be borne in mind that the decision of the Court-martial on the question of its jurisdiction was based upon

Melling's "Laws Relating to the Navy", Sec. 1426, page 567,

which provides as follows:

"A discharge from the Navy operates in bar of trial for a previous desertion from the Navy, but not in bar of a previous offense committed in the Marine Corps. They are distinct branches of the service, and a discharge from the former does not operate as a discharge from the latter. (File 26251-5810:1, Feb. 20, 1912.)"

It is well settled that an administrative interpretation of a statute is entitled to great weight in the Court.

Brown, Adm'x. v. U. S., 113 U. S. 568, 28 L. Ed. 1079, 5 S. Ct. 648;

Stout v. Hancock (C.C.A.-4), 146 F. (2d) 741.

CONCLUSION.

In the case at bar the accused made a contract with the Government by enlisting in the Marine Corps and now urges, as a defense, a matter unrelated to the contract, to-wit: an honorable discharge obtained pursuant to a subsequent fraudulent enlistment. The

danger inherent in permitting members of the military service to escape punishment for desertion, is apparent. As we have recently witnessed, the chaos and confusion attendant with the declaration of war and the enlistment of millions of men into the services make it practically impossible to trace and apprehend all deserters. If the ruling of the Court below in the instant case is permitted to stand, a deserter can escape punishment for his offense by the simple expedient of concealing himself for a reasonable length of time and then enlisting in the same branch of the service. The subsequent receipt of an honorable discharge would make him immune from punishment. The appellant respectfully asserts that he does not believe such a ruling is in accord with the intent of Congress nor conformable to present laws. Accordingly the decision of the Court below ordering the discharge of the appellee from the custody of the appellant was improper and should therefore be reversed.

Dated, San Francisco, California,
October 16, 1946.

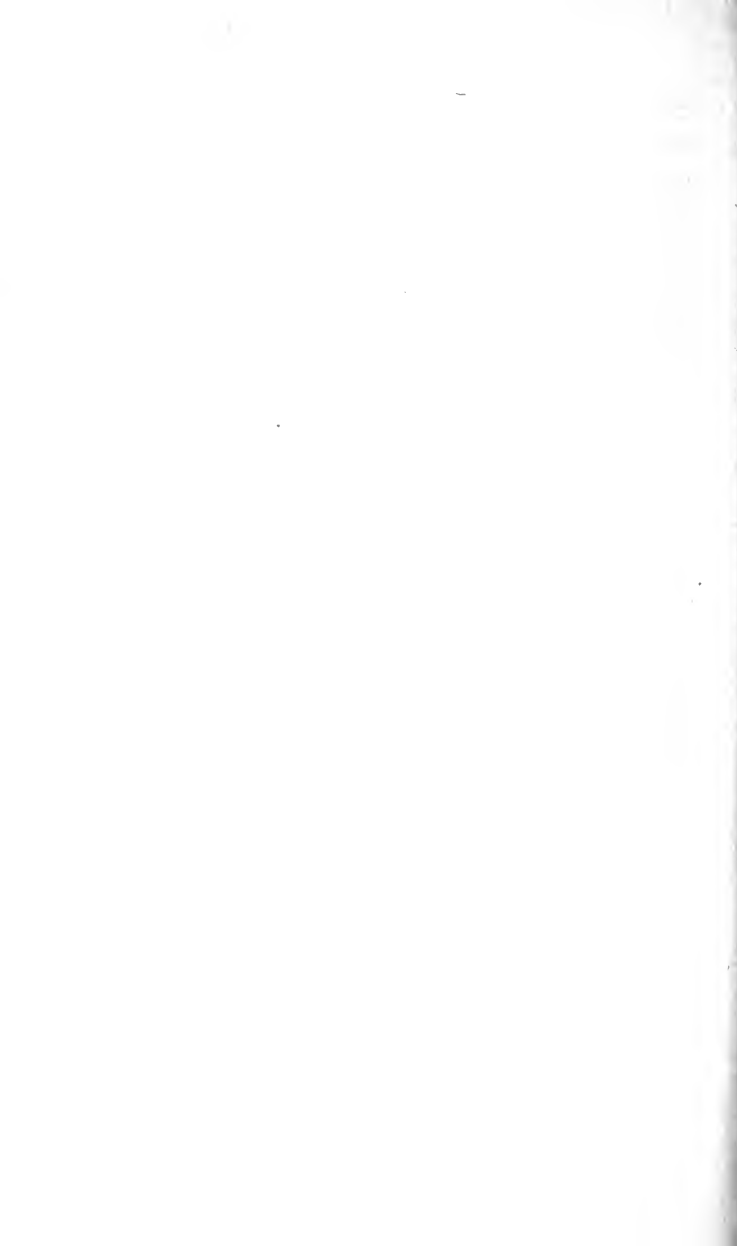
FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellant.



No. 11,364

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps, Command-
ing Officer of the United States Naval
Disciplinary Barracks, Camp Shoemaker,
California,

Appellant,

VS.

EDWARD A. DRAINER,

Appellee.

REPLY BRIEF OF APPELLEE

WOODROW W. KITCHEL,
1704 Tribune Tower,
Oakland 12, California,
Attorney for Appellee.

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No. 11,364

IN THE
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LIEUTENANT COLONEL ERNEST H. GOULD,
United States Marine Corps, Command-
ing Officer of the United States Naval
Disciplinary Barracks, Camp Shoemaker,
California,

Appellant,

VS.

EDWARD A. DRAINER,

Appellee.

REPLY BRIEF OF APPELLEE

STATEMENT OF FACTS.

On November 28, 1945, Edward A. Drainer was charged by Rear Admiral C. H. Wright, U. S. N., Commandant 12th Naval District, and Commander

Naval Operating Base with desertion in the following words, "In that Edward A. Drainer, private, U. S. Marine Corps, while so serving at the Recruit Depot, U. S. Marine Corps Base, San Diego, did on or about 8 September, 1940, desert from said depot and from the U. S. NAVAL SERVICE and did remain a deserter until he was delivered at the U. S. Marine Barracks, Treasure Island Activities, San Francisco, on or about 11 November, 1945". On the above quoted specification Edward A. Drainer was tried by a U. S. Naval General Court Martial on Treasure Island, San Francisco on January 5, 1946, and found guilty of desertion from the U. S. Naval Service.

The Court Martial in making its findings and decision struck out the following words from the specification, "He was delivered at the U. S. Marine Barracks, Treasure Island Activities, San Francisco, California, on or about 11 November, 1945," and substituted the following words, "on or about 27 July, 1943, when he was accepted for enlistment in the U. S. Naval Service".

Edward A. Drainer was sentenced to 18 months confinement at the conclusion of which he was to receive a dishonorable discharge from the U. S. Naval Service. Appellee thereupon was transferred to Camp Shoemaker, California, into the custody of the Appellant. Appellee then petitioned the Court below for a Writ of Habeas Corpus on the grounds that

the Naval Authorities and the Naval Court had no jurisdiction over petitioner in view of the fact that he had been separated from the U. S. Naval Service by an Honorable Medical Discharge which became effective on about November 1, 1944, or more than a year previous to the arrest charge and trial for desertion herein referred to. Petitioner further contended that the Statute of Limitations for the charge of desertion had already run before his apprehension.

The District Court of the United States, Northern District of California, Southern Division, Honorable Michael J. Roche presiding, heard the petition and on the 16th day of April, 1946, granted the Writ and ordered petitioner to be Discharged. From this order Appellant, Lt. Col. Ernest H. Gould, U. S. Marine Corps Commanding Officer of the U. S. Disciplinary Barracks, Camp Shoemaker, California, takes this appeal.

The facts in this case are substantially undisputed and reveal the following: On August 8, 1940, Edward A. Drainer, then 18 years of age, enlisted in the U. S. Marine Corps at Des Moines, Iowa for a period of four years. On September 8, 1940, he absented himself from the Marine Corps at San Diego, California, after serving one month in boot camp.

On July 27, 1943, petitioner, now being 21 years of age and our country being at war, became anxious to return to service in the defense of his country. He

voluntarily enlisted in the U. S. Navy at Clarksberg, West Virginia, his home state. In so enlisting, he gave his true name and address but gave his age as 17 in order to avoid the problem of not having a draft registration card, and failed to disclose his prior military service, one month in boot camp.

On November 1, 1944, after almost a year and a half of honorable service with the U.S. Navy, Aviation Branch, 8 months of which was spent overseas in the South Pacific Area, Edward A. Drainer was given an honorable medical discharge from the U. S. Naval Service, with a 4.0 rating in conduct and a 3.75 in proficiency.

On November 7, 1945, petitioner, now a married man and regularly employed in Arcata, California, was apprehended by civilian authorities, returned to Treasure Island, tried and found guilty of desertion from the U. S. NAVAL SERVICE from September 8, 1940, to July 27, 1943, and sentenced as already stated herein. It might be well to mention at this time that the original specifications charging Appellee with desertion from the U. S. Naval Service were amended by the General Court Martial Board to terminate the desertion on July 27, 1943, the date of Appellee's enlistment in the U. S. Naval Service. Obviously this amendment was made for the Court could not find Drainer deserting and serving the U. S. NAVAL SERVICE at the same time.

Counsel for Appellant remains persistent that the arrest of the Appellee in Cedar Rapids, Iowa, for theft and the serving of a 24 months sentence in a reformatory be brought before the Court. Appellee submits that this incident is irrelevant to the issues in this case however we feel compelled to submit the following facts and circumstances in reply.

When Edward A. Drainer left San Diego September 8, 1940, he was homesick and wanted to return to his home for a few days in West Virginia. He got as far as Cedar Rapids, Iowa, by riding freight trains. Having not eaten for a couple of days, having no funds and being too proud to beg, he and his companion broke the window of a grocery store and took less than a \$1.00's worth of food whereupon he was arrested, charged with breaking and entering and sentenced to the reformatory from which he was released after serving 24 months. At no time in the proceeding was he offered the opportunity or assistance of counsel and further, the fact that he told the authorities that he was in the Marine Corps seemed of no concern to the magistrate. The magistrate did not report his identity to the Marine Corps. Obviously Drainer did not intend to desert in the true sense of the word but only desired to visit home for a few days and then return. The interruption of the Cedar Rapids incident and the failure of the magistrate to give concern to the fact that he was in the Marines, extended the few days intended visit to home to such a long period of time that Mr.

Drainer never did return because of his fear of the consequences, his lack of knowledge of the seriousness of desertion and the lack of confidence that his commanding officer would accept his explanation of events. In other words an absence without leave was thereby turned into a desertion.

CONTENTIONS OF APPELLEE.

1. That the Honorable Michael J. Roche, U. S. District Judge for the Northern District of California properly granted the Writ of Habeas Corpus and ordered the petitioner to be discharged from the custody of Appellant.

2. That the Honorable Michael J. Roche, U. S. District Judge for the Northern District of California properly held that the U. S. Naval Authorities and the Naval Court had NO JURISDICTION over the person of the Appellee in that the Appellee at the time of his arrest, charge and trial by the U. S. Naval General Court Martial was a civilian regularly separated from the service by an Honorable Discharge and therefore was no longer amenable to naval jurisdiction for a desertion committed prior to his receipt of such Honorable Discharge.

3. That the question of fraudulent enlistment is not an issue and is not relevant to the case before

this Court inasmuch as Edward A. Drainer was charged and tried for desertion and not for fraudulent enlistment.

QUESTION PRESENTED.

Can a civilian regularly separated from the service be tried by Court Martial for a desertion committed PRIOR to his receipt of an honorable discharge?

ARGUMENT.

Edward A. Drainer having been honorably discharged from the U. S. Naval Service on November 1, 1944, thereby became a CIVILIAN and was no longer amenable to naval military jurisdiction.

1. It is a general rule that a person is amenable to the military jurisdiction ONLY during the period of his service, thus the acceptance of a discharge or mustering out terminates this jurisdiction.

U. S. v. McDonald, 265 Fed. 695.

Ex parte Wilson (1929) 33 Fed. (2) 214.

U. S. v. McIntyre, 4 Fed. (2) 823.

U. S. v. Warden or Keeper of Naval Prison
in Navy Yard, Brooklyn, N. Y., 265 Fed.
787.

Naval Courts and Boards, Section 334, page
92.

Winthrop's Military Law and Precedence,
2nd Ed. (1920) at page 89.

(a) “. . . it has been uniformly and consistently held by the administrative officers of the Army and Navy that a person separated from either service thereafter ceases to be amenable to military jurisdiction and this practice has been approved by separate opinions of five Attorneys General. (citing opinions). These opinions are largely based on the recognition that a Court Martial under the laws of the U. S. is a court of special and limited jurisdiction. It has no jurisdiction beyond that given it by statute, and since there is no statute giving it jurisdiction over persons not in the military service it may not assume such jurisdiction either as a matter of convenience or public policy.”

Ex Parte Wilson. (Supra).

(b) A member of the U. S. Naval Reserve is no longer subject to military law after release from active duty.

U. S. v. Warden. (Supra).

U. S. v. McDonald. (Supra).

2. Edward A. Drainer having been HONORABLY DISCHARGED from the U. S. NAVAL SERVICE on November 1, 1944, the U. S. NAVAL SERVICE is thereby barred from going behind this discharge and charging Appellee with a desertion prior to the date of said Honorable Discharge.

(a) Where a soldier deserted, was restored to duty, subsequently given an honorable discharge and thereafter charged by a Court Martial Board for the desertion, the Chief Justice of the U. S. Supreme Court delivered the opinion and affirmed the lower court. From this opinion we quote "The Honorable Discharge of the deserted was a formal, final judgment passed by the government UPON THE ENTIRE MILITARY RECORD OF THE SOLDIER AND AN AUTHORITY DECLARATION BY IT THAT HE HAD LEFT THE SERVICE IN A STATUS OF HONOR"

U. S. v. Kelly, 82 U. S. 36.

(b) In 1875 the U. S. Supreme Court reiterated the law of the Kelly case and cited it in this manner: "The plain and definite language of the Kelly case established that honorable discharge is a formal, final judg-

ment of the soldier upon his entire military record. THIS DISCHARGE CANNOT BE IMPEACHED COLLATERALLY"

U. S. v. Landers (1875) 92 U. S. 78.

(c) The Kelly case is again cited with approval in Nordman v. Woodring, Okl. (1938) 28 Fed. (2) 573; Davis v. Woodring (1940) 111 Fed. (2) 523; Parker v. Anders, Vt., (1942) 25 Atl. 41.

(d) The language of the Kelly case was cited favorably in J. A. G. opinion (1918) vol. 2 at page 838: "Mustering out is a formal discharge from the Army making the soldier a civilian and terminating all military authority and jurisdiction over him. In effect an honorable discharge is the judgment of the government upon the entire military record of the soldier and a declaration that he left the service in a state of honor and therefore cannot be tried for a former charge of desertion."

3. The Marine Corps is not a separate branch of the service but is a part of the U. S. Naval Service and is subject to the laws and regulations of the U. S. Navy.

(a) The leading U. S. Supreme Court case on this point and which has been currently cited over and over again is:

U. S. v. Dunn, 120 U. S. 249.

In this case the court considered the status of the Marine Corps and held that it was a part of the Naval Service and that service by an officer of the Navy as an enlisted man in the Marine Corps was to be credited to him in calculating longevity pay.

(b) "The Marine Corps shall at all times be subject to the laws and regulations established for the government of the Navy."

U. S. Code Title 34, Section 715.

(c) U. S. Navy regulations 1920 (reprinted 1941) section 552, sub. (2). "The Marine Corps shall at all times be subject to the laws and regulations of the Navy."

(d) Naval Courts and Boards, section 333 at page 191: "The classes of persons in the Naval Service and subject to the Naval jurisdiction of the U. S. includes all members of the:

1. Regular Navy Active and Retired, Midshipmen, and the Navy Nurse Corps.
2. Officers and men of the Naval Reserve and the Marine Corps Reserve when employed on active duty.
3. The Marine Corps when not detached from duty by order of the President."

(e) "The Marine Corps is part of the Navy and subject to the rules and regulations of the Navy.

Muse v. U. S., 19 Ct. Cls. 441.

(f) In U. S. v. Waller (1925) 225 Fed. 673., a Marine on detached service with the Army by Order of the President deserted. He was tried and convicted by a Naval Court Martial. The Court held the Naval Court had no jurisdiction on the grounds that this Marine was on detached Army service on order of the President. The Court did however say: "Granted that the status of the Marine Corps was at first doubtful. It rendered service at times with the Navy and at times with the Army without being definitely or permanently attached to either department. Its primary relation was finally settled to be with the Navy but it had special and temporary relations when on service with the Army. The early statutes gave recognition to this by providing that it should be subject to the laws and regulations of the Navy except when detached by order of the President for service with the Army. . . ."

(g) In re Byrne (Wash. D. C.) 1928, 26 Fed. 2nd 750. "Upon further and a careful examination I am unable to find any substan-

tial reason for concluding that there is any difference between a seaman and a Mairne."

(h) In *re Doyle* (N. Y.) 1883, 18 Fed. 369: "I am satisfied that it (Marine Corps) is properly classed with and is a part of the Naval Service of the United States. The question was discussed and so determined by Attorney General Wm. Wirt, 1820, and this opinion has been repeatedly followed . . .". "In various acts of Congress making appropriations the Marines are frequently referred to as a part of the Naval Service and are sometimes described as Marines of the U. S. Navy." In this same decision the Court said "Thus paid, thus serving, and thus governed like and with the Navy it is certainly no forced construction to consider them embraced in the spirit of the act of 1837 by the description of persons enlisted for the Navy." The decision further reasons that in the Code of Laws of the U. S. the Marine Corps is provided for in chapter one of title 34 which is entitled "NAVY" while the ARMY is the subject of Title 10. These considerations together with the express provisions of section 715 above quoted that the Marine Corps shall at all times be subject to the laws and regulations of the Navy except when detached for service with the Army by order of the President seems to

be conclusive that the Marine Corps is a branch of the Naval Service.

(i) In *Love v. State Election Board*, Okl., Supreme Ct. (1946) 170 Pac. 2nd 192, we find the following: "The Army and Navy constitute the military forces of the government and for this purpose they are under the authority of one Commanding Chief but over each a Secretary is appointed to manage and administer its affairs." The case then goes on to define what the Army consists of and what the Navy consists of and the Marine Corps is described as a part of the Navy and subject to the laws and regulations for the government of the Navy.

(j) In the current issue of *WORDS AND PHRASES*, Vol. 26 under the definition of "MARINE CORPS" we find the following:

"The Marine Corps of the U. S. is a military body designed to perform services and while they are not necessarily performed on board ship their act of service in time of war is chiefly in the Navy and accompanying or aiding Naval expeditions. In time of peace they are located in Navy Yards mainly, though occasionally they may be used in ports and arsenals belonging more immediately to the Army. They may be ordered to service in either

branch. They are a military body primarily belonging to the Navy and under the control of the head of the Navy Department. . . .” Citing *U. S. v. Dunn* (Supra).

(k) In *U. S. Statutes at Large*, Vol. 1, at page 594 which is the congressional act establishing and organizing the Marine Corps it is provided that the Marine Corps shall be governed by the rules and regulations of the Navy. Although the act does not clearly indicate the status of the Marine Corps in the military organization the obvious implication is that it is not created to be an independent military organization but rather to be a part of the U. S. Naval Service.

Appellee has thoroughly searched the court decisions congressional and statutory records and has been unable to find even one authoritative indication that the Marines are a separate and independent military organization. In view of both the statutory and case law, Appellee submits that only one conclusion can be drawn and that is that the Marine Corps is NOT an independent military organization but that it is a part of the U. S. Navy and made subject to the laws and regulations of the U. S. Navy, with the Secretary of the Navy as the titular head of the U. S. Naval Service.

Appellee calls the Court's attention to the fact that *Edward A. Drainer was not charged with de-*

sertion from the Marine Corps. He was charged with desertion from the U. S. Naval Service. In the original specification Appellee was charged with deserting the naval service from September 8, 1940 until November 11, 1945, however the Naval Court Martial Board amended the original specifications to strike out the period from July 27, 1943, for at this time Appellee re-enlisted in the U. S. Naval Service and therefore could not have been *serving* and *deserting* the *same service* at the same time. Appellee was honorably discharged from the U. S. Naval Service on November 1, 1944.

If Appellant's contention that the Marine Corps is a separate branch of the service is correct then the U. S. Naval Court Martial Board had no jurisdiction to try Appellee on a charge of desertion from the U. S. Naval Service. If Appellant's contention is not correct prosecution for desertion from the U. S. Naval Service after Appellee had received an Honorable Discharge from the U. S. Naval Service is barred by such Honorable Discharge.

4. Appellant has given much time in his brief to the question of fraudulent enlistment. Suffice is it to say that the original charge made by the naval authorities to the Court Martial Board and the decision of the Board was for desertion and NOT fraudulent enlistment. Appellee submits that "fraudulent enlistment" was not properly an issue before the U. S. District Court nor is it a proper issue before

this Court. Appellant's failure to make this an issue before the Naval Court bars him from asking this Court to consider it. (U. S. v. Landers, Supra). Appellee respectfully asserts this contention should not prejudice his cause, nor cloud the true issues.

CONCLUSION.

Edward A. Drainer, who had only six years of schooling, admittedly did a foolish thing when he was 18; however, upon reaching manhood, with his Country at war, when his country's need was the greatest, when men were being drafted to fight, Appellee voluntarily enlisted for service, volunteered for the aviation branch of the Navy and requested duty overseas. He served his country when he was most needed and when danger was the greatest.

Appellee has suffered and has already paid a dear price for an intended absence without leave which was turned into a desertion by a peculiar chain of circumstances beyond his control.

Justice requires that he be made to suffer no more, that his freedom be made permanent, that he be allowed to remain at home supporting his wife and his bed-ridden mother, whose days on this earth are numbered, and that he be allowed to walk proudly as "one who served his country when his country needed men who were willing to fight and die".

Edward A. Drainer served his country, he didn't desert it. The U. S. Naval Service honorably discharged him. We urge that this Court do likewise by affirming the decision of the learned Court below.

Dated: November 14, 1946. Oakland, California.

Respectfully submitted,

WOODROW W. KITCHEL,

Attorney for Appellee.

No. 11376

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE HOME INSURANCE COMPANY OF
NEW YORK, a Corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,

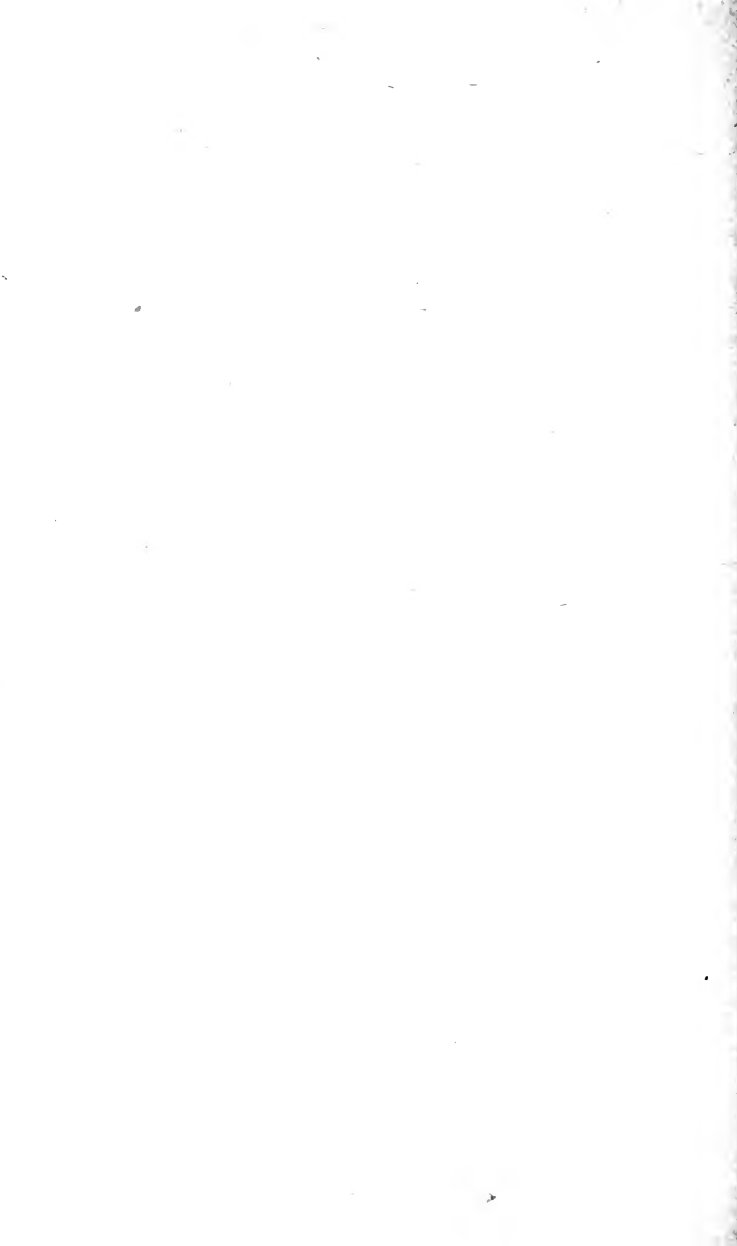
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

SEP 4 - 1946



No. 11376

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE HOME INSURANCE COMPANY OF
NEW YORK, a Corporation,
Appellant,
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Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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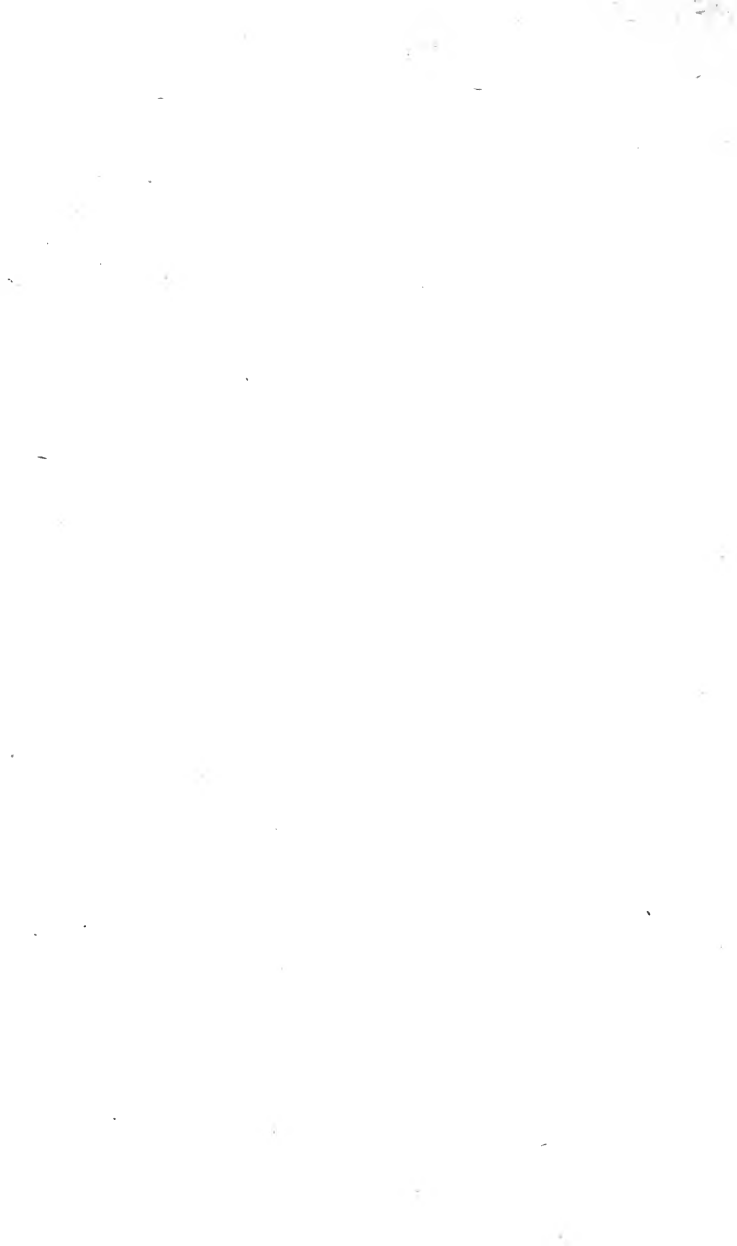
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NAMES AND ADDRESSES OF ATTORNEYS
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VELIKANJE & VELIKANJE,

Miller Building,

Yakima, Washington,

Attorneys for Plaintiff-Appellee.

CHENEY, HUTCHESON & GAVIN,

Miller Building,

Yakima, Washington,

Attorneys for Defendant-Appellant.

In the Superior Court of the State of Washington
in and for Yakima County

No. 33584

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a Corporation,
Defendant.

SUMMONS

The State of Washington, to the said Home Insurance Company of New York, Defendant:

You are hereby summoned and required to be and appear within twenty (20) days after the service of this summons upon you, exclusive of the day of service, if served within the State of Washington, or within sixty (60) days after service of this Summons upon you, exclusive of the day of service, if served out of the State of Washington, and answer the Complaint and serve a copy of your answer upon the undersigned attorneys at the place below specified and defend the above entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the Complaint, a copy of which is herewith served upon you (or which will be filed with the Clerk of said Court within

five (5) days after service of this Summons upon you).

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff.

[Endorsed]: Filed April 20, 1945. [1*]

[Title of Superior Court and Cause.]

COMPLAINT

Comes now the plaintiff and complains and alleges as follows, to-wit:

1.

That the plaintiff is engaged in business as the Barnes-Woodin Fur Department in the City of Yakima, Washington, and has filed with the Clerk of Yakima County his Business Certificate of Assumed Name.

2.

That the defendant is a corporation doing business in the State of Washington.

3.

That beginning on the 17th day of August, 1942, the defendant, Home Insurance Company of New York, entered into a written contract with said plaintiff whereby said defendant agreed to insure the plaintiff against loss on furs or garments trimmed with fur, being the property of customers

* Page numbering appearing at foot of page of original certified Transcript of Record.

accepted by the assured for storage, alteration, repairing, cleaning or remodeling, while said furs or garments trimmed with furs were in the custody or in the control of the plaintiff. That said agreement was incorporated in a written contract termed Furriers—Customers Basic Policy, being No. FC1824; said policy further provided upon an attached endorsement that this policy was extended to cover, during transportation or otherwise, such furs or garments trimmed with fur the property of customers, for which the assured has [2] issued a Certificate of Insurance on forms approved by the Company, and further providing that an additional premium was made payable for this additional coverage of the issuance of such Certificate. That said defendant has a copy of said contract and endorsement.

4.

That under the terms and conditions of said Policy the defendant Company obligated itself to any loss not to exceed the sum of \$100,000.00.

5.

That at all times herein mentioned from and after the 17th day of August, 1942, said policy was in full force and effect, all premiums having been paid and plaintiff having complied with all the terms and conditions of said policy.

6.

That on or about the 9th day of May, 1944, a loss was sustained at plaintiff's place of business at 301

East Yakima Avenue in Yakima, Washington, which was a loss by fire originating from an unknown cause and not the result of any negligence on the part of the plaintiff, his agent or employees. That as a result of said fire, 154 furs, fur coats and articles trimmed with fur belonging to customers, which were in the custody and control of the assured for alteration, repairing, cleaning, remodeling, preparation for storage, return to customers, and in storage, were destroyed or seriously damaged at a loss of \$30,695.00. That said articles, at the time of said loss, were in the storage rooms of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington.

7.

That on the 21st day of August, 1944, being within the extended time of filing proof of claims, the plaintiff caused to be filed with the Home Insurance Company and its agent Fire Company Adjustment Bureau, Inc., detailed proof of loss, showing loss in the sum of [3] \$29,785.00. That said defendant has in its possession said Proofs of Loss and the originals thereof.

8.

That in addition to the amounts set forth in plaintiff's Proof of Loss, several of said customers' garments and furs were covered by certificate endorsements, being special certificate policies, covering an amount beyond that as listed under the assured's legal liability. That said customers had paid an additional premium for said additional coverage and had filed with said Company due proof of loss. That

under a letter dated October 4, 1944, the law firm of Cheney & Hutcheson returned to said customers and policy holders their Proof of Loss with the notation that settlement would be completed with them. That the persons holding such certificates of endorsements and the amounts of loss suffered by them and shown by Proof of Loss under said certificate are as follows:

Mrs. W. H. Beerman.....	\$450.00
Mrs. Gregory Bitter	400.00
Mrs. George Fortier	225.00
E. E. Leach	250.00
Carl Lowenthal	225.00
Elaine McCorkindale	350.00
Dorthea Stanley	800.00
Irene Bryson	400.00

making an additional amount payable to said insureds' of \$1500.00 in excess of the amounts listed in the original Proof of Loss. That said parties had filed due proof of loss with said Company within the time allowed under said certificate policies. That it was discovered after the filing of Proof of Loss that the coat of L. C. Lindsey in the amount of \$375.00, Mrs. Harry Rollis in the amount of \$90.00, and Mrs. Earl Evans in the amount of \$125.00, were not lost or destroyed in said fire, thereby reducing said amount in the sum of \$590.00, making an actual loss of \$30,695.00.

9.

That plaintiff has consummated settlement with all of said parties, including certificate holders, ex-

cept the following names [4] with the value of the articles listed:

Clara Harbin	\$200.00
Mrs. William McClure	30.00
Mrs. William McClure	150.00
Mabel Miller Ray	200.00
Dorothy Riggs	350.00
Mabel G. Smith	150.00

Or a total of.....\$1,080.00

to whom plaintiff is obligated and with whom plaintiff is advised, and therefore alleges, that defendant has made no settlement.

10.

That defendant, pursuant to the service of Proof of Loss, has paid to plaintiff the sum of \$8,200.00, leaving a balance now due and owing in the sum of \$22,495.00, together with interest at 6% per annum from May 9, 1944, until paid; which amount plaintiff has demanded of defendant and which defendant has refused to pay.

Wherefore, plaintiff prays that it have judgment against the defendant Home Insurance Company of New York in the sum of \$22,495.00 together with interest at 6% per annum from May 9, 1944, until paid, together with such other and further relief as to the court may seem meet and proper, together with costs and disbursements herein incurred.

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff. [5]

State of Washington,
County of Yakima—ss.

Meryl Kirkevold, being first duly sworn on oath, deposes and says: That he is the plaintiff in the within and foregoing action; that he has read his complaint herein, knows the contents thereof and the same is true as he verily believes.

MERYL KIRKEVOLD.

Subscribed and sworn to before me this 19th day of April, 1945.

E. FREDERICK VELIKANJE,
Notary Public in and for the State of Washington,
residing at Yakima. [6]

This instrument served upon the Insurance Commissioner of the State of Washington April 23, 1945 at 10:15 a.m. Wm. A. Sullivan, Insurance Commissioner. By A. E. G.

[Title of Superior Court and Cause.]

SPECIAL APPEARANCE

Comes now the defendant, The Home Insurance Company of New York, a corporation, and enters its special appearance herein through its undersigned attorneys, Cheney, Hutcheson & Gavin, solely for the purpose of removing this cause from the above entitled court to the United States District Court for the Eastern District of Washington, Southern Division.

Dated this 7th day of May, 1945.

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 10, 1945. [7]

[Title of Superior Court and Cause.]

NOTICE OF INTENTION TO FILE PETITION
AND BOND FOR REMOVAL

To: Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, the above named plaintiff; and

To: Velikanje & Velikanje, attorneys for plaintiff:

You, and Each of You, Will Please Take Notice that The Home Insurance Company of New York, a corporation, the defendant in the above entitled cause, appearing specially and not otherwise, will hereafter and on or before the 11th day of May, 1945, file in the above entitled court and cause and in the clerk's office of said court in which said suit is now pending, its petition and bond for removal of the said above entitled cause from the said above entitled court to the District Court of the United States for the Eastern District of Washington, Southern Division, and that on the 12th day of May, 1945, at nine thirty o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard,

said petition and bond for removal will be called up for hearing and disposition before the above entitled court in which this proceeding is pending, at which time and place you may be present if you so elect; and at said time the said defendant will present to one of the judges of the above named court at his courtroom in the court house at Yakima, Yakima County, Washington, for his signature, an order removing the above entitled action into the said District [8] Court of the United States for the Eastern District of Washington, Southern Division, pursuant to the statutes of the United States in such cases made and provided.

Copies of said petition and bond for removal and order of removal are served upon you herewith.

Dated this 7th day of May, 1945.

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed May 10, 1945. [9]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

Comes now The Home Insurance Company of New York, a corporation, the defendant above named, and appearing herein specially for the sole and exclusive purpose of presenting and filing this petition and effecting the removal hereinafter re-

ferred to, and for no other, shows and alleges as follows:

1.

That heretofore and within sixty days last past the above entitled action, which is an action at law of a civil nature, was brought and commenced in the above entitled court by the above named plaintiff against your petitioner as defendant. That said petitioner, The Home Insurance Company of New York, a corporation, at the time of the commencement of said action was, and ever since has been, and now is a foreign corporation duly created, organized, operating and existing under and by virtue of the laws of the State of New York, and that at all of said times said petitioner has been and now is a resident, citizen and inhabitant of the State of New York, and not a resident, citizen or inhabitant of the State of Washington.

2.

That the plaintiff herein, Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, at the time of the commencement of said action was, ever since has been, and now is a resident, citizen or [10] inhabitant of the State of Washington, and not a resident, citizen or inhabitant of the State of New York, or of any other state.

3.

That the above entitled action is an action at law of a civil nature for the recovery of judgment in the sum of \$22,495.00, exclusive of interest and costs, alleged to be an unpaid balance due upon a fire in-

insurance policy issued by the defendant to the plaintiff herein, all of which more fully appears from plaintiff's complaint on file herein, reference to which complaint is filed is hereby made. That a bona fide and actual controversy exists and will exist in this action between the plaintiff and the defendant in that the defendant denies absolutely any liability whatever to the plaintiff herein except the sum of \$1800.00. That the amount in controversy in said action, as fully appears from the foregoing and from the record herein, is now and at the time of the commencement of this action was, and ever since said time has been, in amount or value in excess of \$3,000.00, to-wit, the amount or value of \$20,695.00, exclusive of interest and costs.

4.

That this said action is pending undetermined in this court and that the time for the defendant, your petitioner, to answer, demur, or otherwise plead to plaintiff's complaint filed herein has not expired under the laws of the State of Washington or the rules of the above entitled court, in such cases made and provided, and that no application has been made to any court or judge for the order to be applied for in this petition. That service of the summons and complaint in this action was made upon the defendant herein by serving the State Insurance Commissioner of the State of Washington on or about the 23rd day of April, 1945. That under the laws of the State of Washington and the rules of the above entitled court the said defendants are required to ap-

pear and answer the same or [11] otherwise plead to said complaint within twenty days from the date of the service of said summons upon them; and that said period has not now expired. That this action is, as aforesaid, one of a civil nature at law of which the District Court of the United States for the Eastern District of Washington, Southern Division, has original jurisdiction, and that, as hereinabove stated, the amount and value in controversy herein is in excess of \$3,000.00 exclusive of interest and costs, and that the controversy herein between the plaintiff and your petitioner as aforesaid is wholly between citizens and residents of different states.

5.

That your petitioner desires to remove this action before the trial thereof and within thirty days from the filing of this petition, into the District Court of the United States for the Eastern District of Washington, Southern Division, that being the district in which this action is pending, and your petitioner makes and files with this petition a bond in due and legal form, with good and sufficient surety thereon, for its entering in said District Court of the United States within thirty days from the date of filing this petition a copy of the record in this action and for its paying of all costs which may be awarded by said District Court of the United States for the Eastern District of Washington, Southern Division, if said district court shall hold that this action was wrongfully or improperly removed thereto.

6.

That due written notice of this petition and said

bond for removal and of the presentation and proposed filing thereof has been duly given to and served upon the plaintiff herein prior to the filing of the same. [12]

Wherefore, your petitioner prays that said surety and said bond may be accepted and approved and that this action may be removed into the said District Court of the United States for the Eastern District of Washington, Southern Division, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had thereon in this court except the order to remove as required by law, and that your honorable court make and enter an order approving said bond and an order of removal of this action, and to that end your petitioner will ever pray.

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant.

State of Washington,
County of Yakima—ss.

Elwood Hutcheson, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant in the above entitled action, and that he makes this verification for and on behalf of said defendant, for the reason and on the ground that no officer of the corporation defendant is now present in the State of Washington, and that he is duly authorized so to do. That he has read the above and

foregoing petition for removal, knows the contents thereof and believes the same to be true.

ELWOOD HUTCHESON

Subscribed and sworn to before me this 7th day of May, 1945.

[Seal] GORDON HANSON,

Notary Public for Washington, residing at Yakima, therein.

(Acknowledgment of Service.)

[Endorsed]: Filed May 10, 1945. [13]

[Title of Superior Court and Cause.]

BOND FOR REMOVAL

Know All Men by these Presents:

That we, The Home Insurance Company of New York, a corporation, as Principal, and the American Casualty Company of Reading, Pennsylvania, as Surety, are held firmly and bound until Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, Plaintiff in the above entitled action, in the penal sum of Five Hundred and no/100 Dollars (\$500.00), lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our respective successors and assigns, jointly and severally, firmly by these presents.

Upon Condition, Nevertheless, That

Whereas, the said The Home Insurance Company of New York, a corporation, Defendant herein, has petitioned the Superior Court of the State of Washington, in and for Yakima County, for the removal of the above entitled cause therein pending, wherein the said Meryl Kirkevold, doing business as Barnes-Woodin Fur Department is the Plaintiff and the said The Home Insurance Company of New York, a corporation, is Defendant, to the United States District Court for the Eastern District of Washington, Southern Division.

Now, if the said The Home Insurance Company of New York, a corporation, defendant, shall enter into the said United States District Court for the Eastern District of Washington, Southern Division, within [14] thirty days from the date of filing said petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said United States District Court if said Court shall hold that this suit is wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

THE HOME INSURANCE COMPANY
OF NEW YORK, a corporation,

By ELWOOD HUTCHESON,

Their Attorney.

[Seal] AMERICAN CASUALTY COMPANY
OF READING, PENNSYLVANIA,

By JAMES W. ORKNEY,

Attorney-in-Fact.

Service accepted and copy received this 10th day of May, 1945.

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff.

Approved:

N. K. BUCK,
Judge.

[Endorsed]: Filed May 12, 1945. [15]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

The above entitled cause having duly and regularly come on for hearing at this time upon the special appearance and petition for removal of the defendant, The Home Insurance Company of New York, a corporation, duly filed herein, the plaintiff appearing through his attorney, Velikanje & Velikanje, and the defendant appearing specially for the purpose of praying the removal of the above entitled suit from the Superior Court of the State of Washington for Yakima County to the District Court of the United States for the Eastern District of Washington, Southern Division, and not otherwise, through its attorneys Cheney, Hutcheson & Gavin; and the court having heard the arguments of counsel and having duly considered said petition, and the record in this case and being duly advised in the premises, finds as follows:

That this cause is an action of a civil nature at

law and that the amount in dispute and controversy, exclusive of interest and costs, is now and at the time of the commencement of this suit was, and ever since time has been, the sum of \$20,695.00, and in excess of the sum of \$3000.00, exclusive of interest and costs; that the controversy in this suit is now, and at the time of the commencement of this suit was, and ever since has been between [16] citizens and residents of different states; that the plaintiff at the time of the commencement of this action was and now is a citizen, resident, and inhabitant of the State of Washington, and not a citizen, resident, or inhabitant of the State of New York or any other state; that the defendant The Home Insurance Company of New York, a corporation, at the time of the commencement of this action was, and ever since has been, and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of New York and was then and is now a citizen, resident, and inhabitant of the State of New York, and not a citizen, resident or inhabitant of the State of Washington or of any other state; and that said condition of citizenship has so existed at all times since the commencement of this suit.

And it further appearing to the court that this suit is pending undetermined in this court and that the time within which the said defendant is required by the laws of the State of Washington or the rules of this court to demur, answer, or otherwise plead to the complaint of the plaintiff had not expired at the time the defendant's special appear-

ance and petition for removal were filed herein, and that no application had previously been made to any court or judge for the order applied for in said petition;

And it further appearing to the court that the said defendant has made and filed herein a petition for removal in the form and at the time and in the manner and in all other respects as provided by law, and that the plaintiff's objections to said removal are not well taken and should be overruled, and that the defendant has made and filed herein a bond for removal in the penal sum of \$500.00 in due form and duly executed with good and sufficient surety, duly conditioned for its entering within said District Court within thirty days from the date of filing said petition, a certified copy [17] of the record in said action and for paying all costs which may be awarded by said District Court if it shall hold that said action is wrongfully or improperly removed thereto, and that written notice of the filing and presentation of said petition and bond, in the form, at the time, and in the manner, and in all respects as provided by law, has been given;

And it further appearing to the court that the said petition and bond are sufficient to authorize the removal of said suit to the District Court of the United States for the Eastern District of Washington, Southern Division, and that the said petition for removal should therefore be allowed and this suit removed to said District Court;

Now, Therefore, it is Hereby Ordered, Considered,

Adjudged and Decreed that said petition for removal and bond be, and they are hereby approved and accepted; and that the above entitled suit be, and it is hereby removed to the District Court of the United States for the Eastern District of Washington, Southern Division, sitting at Yakima, Washington, and that the clerk of this court be, and he is hereby authorized and directed to forthwith prepare and certify a complete transcript of the record of said cause for filing in and with the clerk of said District Court at Yakima, Washington, within the time allowed by law; and that all of the proceedings in this court are hereby stayed.

Done in Open Court this 12th day of May, 1945.

N. K. BUCK,

Judge.

Presented by:

CHENEY, HUTCHESON &

GAVIN,

Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed for Record May 12, 1945. [18]

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision

Civ. No. 210

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,
Defendant.

NOTICE OF REMOVAL AND FILING
OF RECORD IN FEDERAL COURT

To: Meryl Kirkevold, doing business as Barnes-
Woodin Fur Department, Plaintiff herein; and

To: Velikanje & Velikanje, attorneys for plaintiff:

You Are Hereby Ordered that heretofore and on
or about the 12th day of May, 1945 by an order of
the Superior Court of the State of Washington in
and for Yakima County the above entitled cause was
duly removed from said court to the District Court
of the United States for the Eastern District of
Washington, Southern Division, sitting at Yakima,
Washington, and a transcript of the record in said
cause was filed in said district court of the United
States for the Eastern District of Washington,
Southern Division, at Yakima, Washington; on the
1st day of June, 1945.

Dated this 1st day of June, 1945.

CHENEY, HUTCHESON &
GAVIN,

ELWOOD HUTCHESON,

Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 1, 1945. [19]

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.

Civ. No. 210

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,
Defendant,

CLARA HARBIN, MRS. WILLIAM McCLURE,
MABEL MILLER RAY, DOROTHY RIGGS,
and MABEL G. SMITH,
Additional Third-Party Defendants.

ORDER GRANTING MOTION TO ADD
ADDITIONAL PARTIES

This matter having duly and regularly come on
for hearing upon the motion of the defendant here-
in, Home Insurance Company of New York, a cor-

poration, to add additional parties and the granting of said motion having been agreed to by the plaintiff and defendant herein and the court being duly advised in the premises;

Now, Therefore, it is Hereby Ordered that Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, Mabel G. Smith, and Erma Turnell be and they are hereby added as additional third-party defendants herein, and the defendant is hereby permitted and granted leave to serve and file its answer and counter-claim herein.

Done in open court this 12th day of June, 1945.

L. B. SCHWELLENBACH,

Judge.

Presented by:

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant.

O. K.

VELIKANJE & VELIKANJE

Attorneys for Plaintiff.

[Endorsed]: Filed June 12, 1945. [20]

[Title of District Court and Cause.]

ANSWER AND COUNTER-CLAIM

Comes now the above named defendant and for its answer to the complaint of the plaintiff herein admits, denies, and alleges as follows:

FIRST DEFENSE

1. Defendant admits the allegations contained in paragraphs 1 and 2 of the complaint.

2. Answering paragraphs 3 and 5 thereof, defendant admits that in 1942 the defendant entered into a written contract with the plaintiff and issued to the plaintiff a fire insurance policy or contract termed Furriers-Customers Basic Policy, being policy number FC 1824, upon which there was an attached endorsement, admits that the defendant has a copy thereof, and that the same was in full force and effect at the of the fire hereinafter referred to, but denies each and every other allegation therein contained.

3. Answering paragraph 4, defendant denies each and every allegation therein contained. [21]

4. Answering paragraph 6, defendant admits that a loss by fire was sustained at plaintiff's said place of business on May 9, 1944, but denies each and every other allegation therein contained, and particularly denies that the amount of said fire loss was the sum therein stated or any other sum in excess of \$10,000.00; and defendant also particularly denies that said articles at the time of said loss were in the storage room of plaintiff.

5. Answering paragraph 7, defendant admits that on August 21, 1944, being within the extended time of filing proof of claim, the plaintiff filed a purported proof of loss with the defendant, and that defendant has the same in its possession, but denies each and every other allegation therein contained.

6. Answering paragraph 8, defendant admits that it issued certain certificate endorsements to some of the plaintiff's customers, admits that the customers named in said paragraph timely filed proof of loss with the defendant, and admits that the Lindsey, Rollis, and Evans fur coats were not lost or destroyed in said fire, but denies each and every other allegation therein contained, and particularly denies that the individuals therein named sustained a loss in the amounts therein stated, and denies that the total actual loss was in the amount therein alleged, or in any other sum in excess of \$10,000.00.

7. Answering paragraph 9, defendant admits that neither plaintiff nor defendant has made any settlement with the persons named in said paragraph, but denies each and every other allegation therein contained, and particularly denies that said persons sustained losses in the amounts therein stated, or in any other sum or at all.

8. Answering paragraph 10, defendant admits that it has paid to plaintiff by reason of said fire loss the sum of \$8200.00 and no more, but denies each and every other allegation therein contained,

and particularly denies that defendant is now indebted to plaintiff in the sum therein stated, or in any other sum or at all. [22]

SECOND DEFENSE

1. That said insurance policy, number FC 1824, issued by the defendant to the plaintiff referred to in the complaint herein, and particularly that certain portion thereof and rider attached thereto entitled "Furriers' Customers Custody Rider" being part of the said contract between the plaintiff and defendant herein sued upon, provided in part as follows:

"Furriers' Customers Custody Rider

"This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning or remodeling (and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property,) but excluding any stock belonging to the Assured or to any subsidiaries or affiliates of the Assured.

"This policy covers during transportation or otherwise while the property is in the custody or control of the Assured for alteration, repairing, cleaning, remodeling, or preparation for storage or for return to customers; and while in storage rooms, vaults or safes at locations hereinafter described.

"This Policy Insures:

"Against all risks of loss of or damage to the in-

sured property including the Assured's legal liability therefor, except as hereinafter provided * * *

"2. This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit of liability as stated below for the location at which such casualty occurs:

"Limits of Liability

"In storage rooms, vaults and safes: \$100,000.00.

Outside of storage rooms, vaults and safes: \$10,000.00.

Locations: at 301 E. Yakima Avenue, Yakima, Washington.

nor for more than \$5000.00 while at any other location not used by the Assured for storage, nor for more than \$5000.00 while in transit.

"3. It is warranted by the Assured that an accurate record will be kept of all receipts issued showing the customer's name, address and description and stipulated amount on each article included therein, which record shall be open for inspection by duly authorized representatives of this Company

at all reasonable times during the policy period and for one year thereafter." [23]

2. That said contract provides that defendant shall not be liable for more than the amount stipulated in the receipt issued by the plaintiff as applying to each respective article. That in numerous instances the amount claimed by the plaintiff in said so-called proof of loss is greatly in excess of the amount stipulated in the receipt issued by the plaintiff as applying to such respective articles; but the liability of the defendant is definitely limited by the contract in that respect.

3. That none of the fur coats or other articles situated in the storage room, vault, and safe of the plaintiff at his said place of business at 301 East Yakima Avenue, in Yakima, Washington, were lost or damaged in any respect by reason of said fire which occurred there on May 9, 1944, referred to in the complaint herein. That all of the fur coats and other articles which were lost or damaged in said fire were then located outside of storage room, vault, and safe of the plaintiff in said place of business. That by reason thereof the maximum liability of the defendant by reason of said fire cannot exceed in any event the maximum limit of \$10,000.00.

4. As stated in the complaint, the defendant has prior to the commencement of this action paid to plaintiff the sum of \$8200.00. Defendant was and is ready, able, and willing to pay the balance of said maximum limit up to \$10,000.00, to-wit, the sum of \$1800.00, but the same has not yet been paid be-

cause of uncertainty as to whom the same should be paid; that the plaintiff has not yet made settlement with all of the owners of fur coats and other articles which are alleged to have been destroyed or damaged by said fire. Defendant is ready, able, and willing to pay said remaining sum of \$1800.00 to whomsoever the court shall adjudge herein is entitled thereto. [24]

COUNTER-CLAIM FOR INTERPLEADER

1. Defendant repeats and incorporates by reference herein and makes a part hereof all of the allegations of paragraphs 1, 2, 3, and 4 of the foregoing second defense of the defendant in this answer, the same as though fully set forth herein.

2. That defendant is at this time filing a motion asking the court to enter an order making Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith additional third-party defendants herein. Said persons and each of them were and are citizens and residents of the State of Washington, and not of the State of New York. Defendant is a corporation organized and existing under the laws of the State of New York and is a citizen and resident of the said State of New York and not of the State of Washington.

3. Said additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith were the owners of fur coats and other articles which are alleged to have been damaged by said fire on May 9, 1944 at

the plaintiff's place of business at 301 East Yakima Avenue, in Yakima, Washington. No settlement has been made with said persons by either the plaintiff or the defendant herein.

4. Each of said additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith, and the plaintiff herein are claiming to be entitled to receive payment from the defendant under said policy and have made demand for payment thereof. By reason of these conflicting claims of the said parties, defendant is in great doubt as to which of said parties is entitled to be paid the remaining balance of the amount of the said policy in the said sum of \$1800.00. The defendant is thereby exposed to double or multiple liability to said parties or their [25] assigns. The defendant is not liable to any or all of the said claimants for any sum in excess of the remaining balance of \$1800.00. Said additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith, and each of them reside in Yakima County, and within the Eastern District of Washington, Southern Division of the above entitled court, and the presence of said parties is necessary and required for the granting of complete relief in the determination of this counter-claim for interpleader of the defendant herein. Defendant has no plain, speedy, and adequate remedy at law.

Wherefore, defendant demands and prays for judgment and decree of this court as follows:

(1) That the plaintiff is not entitled to recover herein, and that the complaint of the plaintiff herein be dismissed with prejudice.

(2) That the liability, if any, of the defendant herein be limited in accordance with the provisions of said insurance contract hereinabove quoted, namely, limited as to each respective article to the amount stipulated in the receipt issued by the plaintiff and further limited so as not to exceed the total maximum sum of \$1800.00 to the plaintiff and all other persons whomsoever by reason of said fire in addition to the sum of \$8200.00 heretofore paid by defendant to plaintiff.

(3) That said additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, and Mabel G. Smith be added as additional parties herein by order of the court and that said additional parties and the plaintiff herein be required to interplead and settle between themselves their rights to the money due under said policy, if any, and that defendant be discharged from all liability in the premises except the sum of \$1800.00 to such person or persons whom the court shall adjudge are entitled thereto. [26]

(4) That said additional third-party defendants and each of them and all persons claiming or who may hereafter claim by, through, and under them by reason of assignment from them or otherwise, be permanently restrained and enjoined from instituting or prosecuting any claim or action against the defendant herein for the recovery of the amount

of said policy or any part thereof, or for any recovery whatsoever by reason of said fire, or any damage sustained thereby.

(5) That defendant have and recover judgment against the plaintiff for its costs and disbursements herein to be taxed.

(6) Defendant prays for such other further relief as to this honorable court may seem just and equitable in the premises.

CHENEY, HUTCHESON &
GAVIN,
/s/ ELWOOD HUTCHESON,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 1, 1945. [27]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff in the above-entitled action and in reply to the Answer and Counter-Claim of the defendant herein admits, denies and alleges, as follows:

1.

Plaintiff admits all of the paragraphs of defendant's first defense, except such allegations as are contrary to plaintiff's complaint and are repugnant thereto.

2.

Plaintiff admits paragraph 1 of defendant's second defense.

3.

Plaintiff denies paragraph 2 and 3 of defendant's second defense.

4.

Plaintiff admits that defendant, prior to the commencement of this action, paid the plaintiff the sum of \$8,200.00, but denies the rest and remainder of said paragraph 4 of defendant's second defense.

5.

Plaintiff admits the reference to paragraph 1 of the second [28] defense, but denies the rest and remainder of paragraph 1 of defendant's counter-claim for interpleader.

6.

Plaintiff denies the rest and remainder of defendant's counter-claim for interpleader, and specifically denies that the third party defendants therein named are entitled to any part or portion of any sums of money coming to or belonging to the plaintiff herein under said insurance policy, and specifically alleges that if said third party defendants are entitled to any sums whatsoever said sums of money are in an amount over and in excess of any amount prayed for by said plaintiff.

Wherefore, Plaintiff prays that judgment be entered in conformity with its complaint now on file and of record herein.

That having fully answered the Answer and Counter-Claim of the defendant, that the same be dismissed and held for naught and for such other and further relief as to this honorable court may seem just and equitable in the premises.

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff.

Service Accepted and Copy Received this 25th day of June, 1945.

/s/ CHENEY, HUTCHESON &
GAVIN,
Attorneys for Defendant.

[Endorsed]: Filed June 25, 1945. [29]

[Title of District Court and Cause.]

DEFAULT JUDGMENT AS TO ADDITIONAL
THIRD-PARTY DEFENDANTS

The above entitled cause coming on for hearing in open court this 31st day of August, 1945, upon the motion and affidavit of defendant for an order adjudging the additional third-party defendants hereinafter named to be in default for want of an appearance in said action and upon all the files and records herein, defendant appearing by Cheney, Hutcheson & Gavin and Elwood Hutcheson, attorneys of record, plaintiff appearing by E. F. Velikanje, one of his attorneys of record, Dorothy Riggs, additional third-party defendant, having served upon plaintiff and defendant herein a notar-

ized letter in answer to the summons and complaint and answer and counter-claim, which said letter was ordered filed herein by the court and ruled by the court to constitute an appearance and claim by said Dorothy Riggs, per se, and the other additional third-party defendants not appearing either in person or by anyone in their behalf, and it appearing to the court that these other said additional third-party defendants have been duly and personally served with summons and complaint of the plaintiff and answer and counter-claim of the defendant, and that more than sixty days have elapsed since the date of such service upon said additional third-party defendants, and the court being fully advised in the premises, it is hereby [30]

Ordered, Adjudged and Decreed that the additional third-party defendants, Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Mabel G. Smith Coffin, whose name was formerly Mabel G. Smith, and Erma Turnell be and they are hereby adjudged to be in default in this action, and it is hereby

Ordered, Adjudged and Decreed that none of said additional third-party defendants herein has any right, title, claim, or interest whatever in or to the funds involved herein or the proceeds of the insurance policy involved and referred to in the pleadings on file herein, and it is hereby

Ordered, Adjudged and Decreed that the letter of Dorothy Riggs, an additional third-party defendant, ordered filed herein, constitutes an appearance

and claim by said Dorothy Riggs, per se, and the motion for default as to said Dorothy Riggs is denied and counsel for defendant are ordered to advise her of this order of the court.

Done in open court this 31st day of August, 1945.

CHARLES H. LEAVY,
District Judge.

Presented by:

CHENEY, HUTCHESON &
GAVIN,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 1, 1945. [31]

[Title of District Court and Cause.]

ADMISSION

Comes now the Home Insurance Company of New York, a corporation, the defendant herein, and in response to the request for admission dated September 24, 1945, served and filed by the plaintiff herein, pursuant to Rule 36 of the Federal Rules of Civil Procedure, said defendant hereby admits the genuineness and validity of the releases and assignments attached thereto and served upon the undersigned therewith; and said defendant states that it will make no contention herein that the said releases and assignments do not contain genuine signatures.

Dated at Yakima, Washington this 28th day of September, 1945.

CHENEY, HUTCHESON &
GAVIN,

/s/ ELWOOD HUTCHESON,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 29, 1945. [32]

[Title of District Court and Cause.]

ORDER RELATING TO PRE-TRIAL
HEARING

This matter having duly and regularly come on for hearing before the undersigned Judge of the above-entitled court on the 6th day of December, 1945, upon pre-trial hearing, plaintiff appearing by his attorneys, Velikanje & Velikanje, and the defendant appearing by its attorneys, Cheney, Hutcheson & Gavin; and the Court having held a pre-trial hearing;

It is, Now Here Ordered that as a result of said hearing that the issues be narrowed to the following questions:

1. As to the question of liability of the defendant, Home Insurance Company, under the terms

and conditions of the insurance policy, being a question of liability under the \$10,000.00 or the \$100,000.00 provision, to be determined by evidence and facts as to place of storage and interpretation of policy.

2. As to the liability of the defendant, Home Insurance Company, based upon individual "floater" policies; that is, as to whether said policies are under the policy limitations, if there are such limitations, or whether they are in addition thereto.

3. Actual amount of loss dependent upon value of coats destroyed [33] parties to be limited in proof of valuations by not to exceed three expert witnesses on each side, said number not to include the coat owners, who shall be allowed to testify in addition to experts.

4. Liability to Third-Party Defendant Dorothy Riggs and her claim in said action.

5. Question as to when interest would begin to run on any amount of recovery.

It is Further Ordered that there was included and admitted at said pre-trial hearing that the number of coats destroyed or damaged is approximately 149, being the coats listed in the Proof of Loss, less the following: Mrs. Earl Evans—\$125.00, L. C. Lindsey—\$375, Mrs. Harry Rollins—\$90.00, together with those persons made Third-party Defendants. That the Proof of Loss as made by plaintiff was sufficient. That no claim will be higher than the valuation set forth on the receipt issued to coat

owners, except in the case of those coats upon which there was a separate policy with the company.

Done in Open Court this 7th day of December, 1945.

/s/ CHARLES H. LEAVY,

District Judge.

Presented by:

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

Attorneys for Plaintiff.

O. K. as to Form:

CHENEY, HUTCHESON &

GAVIN,

/s/ ELWOOD HUTCHESON,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 7, 1945. [34]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division.

Civ. No. 210

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,
Defendant,

CLARA HARBIN, MRS. WILLIAM McCLURE,
MABEL MILLER RAY, DOROTHY RIGGS,
and MABEL G. SMITH, and ERMA TUR-
NELL,

Additional Third-Party Defendants.

TRANSCRIPT OF PROCEEDINGS.

Be it remembered that on the 7th day of March, 1946, at the hour of 2:00 o'clock p. m., the above entitled and numbered cause came on for trial before the Hon. Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Eastern District of Washington, Southern Division, at Yakima, Washington; the plaintiff appearing by his attorneys Velikanje & Velikanje (by Mr. Fred Velikanje), and the defendant Home Insurance Com-

pany appearing by its attorneys Cheney, Hutcheson & Gavin (by Mr. Hutcheson); and

Whereupon, the following proceedings were had and testimony given, to-wit: [37*]

The Court: Docket 210, Kirkevold versus Home Insurance Company. Are the parties ready?

Mr. Velikanje: Plaintiff is ready, Your Honor.

The Court: Now, I am somewhat familiar with this matter as I had some angles of it presented to me sometime here in December, I think it was.

Mr. Velikanje: That is correct.

The Court: And the issues then were substantially narrowed down to some five in number. Has anything occurred since that time that changes the matter in any way?

Mr. Velikanje: The only thing would be this; Your Honor, as to number four, Mr. Hutcheson advises that he received a letter from the third party defendant who advises she will not be here for trial, and make no appearance. Is that correct?

Mr. Hutcheson: That is correct, so I assume when it comes to entry of judgment, the default should be taken as to Dorothy Riggs, third party defendant. The default has been entered as to all third party defendants except her.

The Court: Yes. Very well, then you may proceed.

Mr. Velikanje: Does your Honor wish a sum-

* Page numbering appearing at foot of page of original Reporter's Transcript.

mary of the case, or are you familiar enough with the [38] pleadings.

The Court: I think I am familiar enough with it in a general way. The only question that I have in mind now is as to whether we might adopt some method of procedure whereby we can expedite the disposition of this matter.

We have here first a question of liability.

Mr. Velikanje: That is correct.

The Court: Now, is there some proof you desire to submit on that issue?

Mr. Velikanje: Yes, there will be. However, I might state this: Mr. Hutcheson, although we have not stipulated states that he does not plan to submit counter evidence as to value of these coats, so we have by that agreement shortened our—or will shorten our time necessary in that they will be proved by—quite definitely by the party interested, from his testimony.

The Court: And not by expert testimony?

Mr. Velikanje: Only so far as he himself and his brother is an expert, if it is necessary to put his brother on to substantiate values, but we have not brought in any outside experts by that agreement. Is that not correct, Mr. Hutcheson?

Mr. Hutcheson: Well, I don't know that there [38] is any agreement, but in substance that is correct.

The Court: Well, then, you may proceed.

Mr. Velikanje: I will call Meryl Kirkevold.

MERYL KIRKEVOLD

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

The Clerk: Your name is Meryl Kirkevold?

Witness: It is.

Q. Your name is Meryl Kirkevold?

A. Yes.

Q. And you are the plaintiff in this action?

A. I am.

Q. Mr. Kirkevold, for some years last past, you have been doing business as the Barnes-Woodin Fur Department?

A. That is correct.

Q. Located here in the City of Yakima?

A. Yes.

Q. The street number—do you know the street number of the Barnes-Woodin Company?

A. 301 East Yakima Avenue, I think.

Q. 301 East Yakima Avenue? [40]

A. I think it is, yes.

Q. Mr. Kirkevold, I hand you Plaintiff's identification number 1. What is that?

A. That was the insurance policy on customer's goods, insurance policy.

Q. A policy that you had taken out?

A. Yes, sir.

Q. What firm did you take that out for?

A. That is the Home Insurance Company.

(Testimony of Meryl Kirkevold.)

Q. What? A. Hargreaves & Orkney.

Q. That is a local insurance agency?

A. Yes, sir.

Mr. Velikanje: We offer in evidence this.

Mr. Hutcheson: No objection. Of course, there is one rider there which was attached subsequently. That is correct, isn't it?

Mr. Velikanje: That is correct. The rider is effective June 4th, 1944.

Mr. Hutcheson: With that understanding we have no objection.

The Court: It will be admitted in evidence.

The Clerk: Plaintiff's Exhibit 1.

(Whereupon, insurance policy referred to was received in evidence and marked Plaintiff's Exhibit 1.) [41]

PLAINTIFF'S EXHIBIT No. 1

(Cover Page)

Furriers' Customers Basic Policy

Expires: Continuous Until Cancelled

Name of Assured: Barnes-Woodin Fur Dept.

Amount: \$ Open. Premium, (Deposit) \$50.00

No. FC-1824

The Home Insurance Company—New York

[Sticker]: Northwestern Mutual Fire Association,
Northwest Casualty Company. Hargreaves & Ork-

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

ney, 503 Miller Building, Yakima, Washington. Telephone 6011.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

(Face of Policy)

FURRIERS' CUSTOMERS BASIC POLICY

No. FC-1824

Stock Company

**THE HOME INSURANCE COMPANY
NEW YORK**

Organized 1853

Deposit Premium \$50.00

In consideration of the stipulations named herein, does insure Meryl Kirkevold dba Barnes-Woodin Fur Dept., hereinafter called the Assured, whose address is 301 E. Yakima Avenue, Yakima, Washington, for his (their) account and for account of customers hereinafter described,

From the 17th day of August, 1942, at Noon, Standard Time at place of issuance, until cancelled as herein provided.

(Attach Rider)

**FURRIERS' CUSTOMERS CERTIFICATION
ENDORSEMENT**

1. This policy is extended to cover during trans-

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

portation or otherwise such Furs or garments trimmed with Fur, the property of customers, for which the Assured has a Certification of Insurance, on form approved by this Company. No Certification of Insurance issued shall cover beyond the time the ownership remains vested in the person to whom issued, nor shall any Certification be issued for a period longer than twelve (12) months from the date of issuance.

2. It is agreed by the Assured that Certifications of Insurance shall be issued only in combination with annual storage agreements at a combined storage and insurance charge, and that the rate and premium applying to this insurance shall not be stipulated as such on any Certification, bill, circular or advertising matter.

3. The additional premium for the insurance granted by this endorsement shall be computed at the rate of Fifty (50c) cents per \$100 per annum of the amount stipulated on each Certification issued. Such additional premium to be paid monthly on or before the 15th day of the month following the issuance of such Certifications.

4. The Assured agrees to forward to this Company or its Agent at the close of each business day copies of all Certifications issued.

5. The cancellation of this policy shall not affect any risk then pending under Certifications issued by the Assured as herein provided. It is understood

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

and agreed that any one or all Certifications may be cancelled at any time by the Company, giving five (5) days' written notice thereof, mailed to the address of the person to whom issued as stated in the Certification, the unearned portion of paid premium to be returned to the Assured.

Subject to all terms, conditions and warranties of the policy and its rider to which this endorsement is attached.

Attaching to and forming part of Policy No. FC 1924 of the Home Insurance Company.

Dated September 1, 1942.

THE HOME INSURANCE CO.

By /s/ JAMES E. MOORE,
Agent.

FURRIERS' CUSTOMERS CUSTODY RIDER

This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alterations, repairing, cleaning or remodeling and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property, but excluding any stock belonging to the Assured or to any subsidiaries or affiliates of the Assured.

This policy covers during transportation or otherwise while the property is in the custody or control

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)
of the Assured for alteration, repairing, cleaning, remodeling, or preparation for storage or for return to customers; and while in storage rooms, vaults or safes at locations hereinafter described.

This Policy Insures:

Against all risks of loss of or damage to the insured property including the Assured's legal liability therefor, except as hereinafter provided.

**This Policy Does Not Cover the Insured Property
or the Assured's Legal Liability for:**

(a) Loss or damage occasioned by gradual deterioration, moth, vermin, inherent vice; or damage sustained due to any process or while actually being worked upon and resulting therefrom unless caused by fire;

(b) Loss or damage occasioned by war, invasion, hostilities, rebellion, insurrection, confiscation by order of any Government or Public Authority, or risks of contraband or illegal transportation or trade.

1. Warranted that the Assured shall use due diligence to maintain during the period of this policy such protective safeguards as are indicated in the proposal for this policy.

2. This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article,

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit of liability as stated below for the location at which such casualty occurs:

Limits of Liability

In storage rooms, vaults and safes: \$100,000.00.

Outside of storage rooms, vaults and safes, \$10,000.00.

Location: 301 E. Yakima Avenue, Yakima, Washington.

nor for more \$5,000.00 while at any other location not used by the Assured for storage, nor for more than \$5,000.00 while in transit.

3. It is warranted by the Assured that an accurate record will be kept of all receipts issued showing the customer's name, address and description and stipulated amount on each article included therein, which record shall be open for inspection by duly authorized representatives of this Company at all reasonable times during the policy period and for one year thereafter.

4. The Assured agrees to report to this Company not later than the fifteenth day of every month the total amount at risk hereunder on the last day of the

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

preceding month and to pay premium thereon at the rates herein provided. A deposit premium of \$50.00 is due and payable on the date hereof and annually thereafter, and all monthly premiums shall be charged against this deposit premium until such time as it shall have been earned by this Company, after which time the additional monthly premium shall be due and payable on the date reports are made by the Assured as herein required.

5. The premium for this insurance shall be computed at the following monthly rate(s): .1009¢ per \$100.00 of the amount at risk.

6. Any loss, at the option of this Company, may be paid to the Assured, or adjusted with and paid to the Assured's customer or to the owner of the property.

7. The Assured warrants that no certifications, certificates or policies of insurance covering the property insured hereunder will be issued by or through the Assured other than this Company, as authorized under the terms of this policy when so endorsed.

8. This policy is deemed continuous, but it may be cancelled at any time by the Assured; or it may be cancelled by the Company on fifteen (15) days' written notice thereof mailed to the Assured. If this policy shall be cancelled or become void or cease, the deposit premium having been paid, the balance of

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

the deposit premium not yet earned shall be returned to the Assured.

Subject to all terms, conditions and warranties of the policy to which this rider is attached.

Attached to and forming part of Policy No. FC 1824 of the Home Insurance Company, issued to Barnes-Woodin Fur Dept., at its Seattle, Washington Agency.

Date of Endorsement: September 1, 1942.

THE HOME INSURANCE CO.

By /s/ JAMES E. MOORE,

Agent.

This Policy is Made and Accepted Subject to the Foregoing Stipulations and Conditions and to the Conditions Printed on the Back Hereof, Which Are Hereby Specially Referred to and Made a Part of This Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

and attested these presents, but this policy shall not be valid unless countersigned by a duly authorized Agent of the Company.

/s/ W. KURTH,
President.

/s/ W. BEYER,
Secretary.

Countersigned at Seattle, Washington, this 1st day of September, 1942.

THE HOME INSURANCE CO.

By /s/ JAMES E. MOORE,
Agent.

GENERAL CONDITIONS

1. It is warranted by the Assured that this insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

2. If there is any other insurance covering this property insured hereunder, whether prior, subsequent to, or simultaneous with this insurance, which in the absence of this insurance would cover the loss or damage hereby covered, then this Company shall not be liable hereunder for more than the excess over and above such other insurance. This clause, however, shall not apply to insurance effected by a customer or a member of the family of a customer of the Assured, and the existence of such insurance, or payment of a loss thereunder, shall not constitute

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

a defense to any claim otherwise payable under this policy, nor shall such insurance be called on to contribute to any loss payable hereunder.

3. The Assured shall immediately report to this Company or its Agent every loss or damage which may become a claim under this policy, and also shall file with this Company or its Agent within ninety (90) days from date of loss, a detailed sworn proof of loss. Failure by the Assured to report the said loss or damage and to file such written proofs of loss as herein provided, shall invalidate any claim under this policy.

4. In case of loss or damage it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance; nor shall the acts of the Assured or this Company in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or an acceptance of abandonment; to the charge whereof, this Company will contribute according to the rate and quantity of the sum herein insured.

5. The Assured shall submit, and so far as is within his or their power shall cause all other persons interested in the property and members of the household and employees to submit, to examinations under oath by any persons named by the Company,

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

relative to any and all matters in connection with a claim, and shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made.

6. All adjusted claims shall be paid or made good within thirty (30) days after presentation and acceptance of satisfactory proofs of interest and loss at the office of this Company. No loss shall be paid hereunder if the Assured has collected the same from others.

7. It is a condition of this policy that no suit, action or proceeding for the recovery of any claim under this policy shall be maintainable in any court unless the same be commenced within twelve (12) months next after the calendar date of the happening of the physical loss or damage out of which the said claim arose. Provided, however, that if by the laws of the state within which this policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted, by the laws of such state, to be fixed herein.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

[Stamped]: Please Attach to Policy

Furriers' Customers Policy

Effective: June 24, 1944—In consideration of the premium charged, it is hereby understood and agreed that the limits of Liability applicable to customers' goods "In storage rooms, vaults and safes" is increased to \$125,000, and the limit applicable to customers' goods "outside of storage rooms, vaults and safes" is increased to \$20,000.

All other terms and conditions of this policy remain unchanged.

Attached to and forms part of Policy No. FC 1824 of Home Insurance Company, issued to Barnes-Woodin Fur Dept. Dated at Seattle, Washington, June 30, 1944.

HARGREAVES & ORKNEY,

By /s/ J. W. ORKNEY.

Furriers Customers

A.P. \$41.22

Due to an adjustment under this policy an additional premium of \$41.22 is hereby charged the Assured based on the following computation:

Earned premium for the period August 17th	
to August 31, 1943	\$ 91.22
Less Deposit Premium	50.00
	<hr/>
Additional Premium	\$ 41.22

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

All other terms and conditions of this policy remain unchanged.

Attached to and forms part of Policy No. FC 1824 of Home, issued to Barnes Woodin Fur Dept. Dated at San Francisco, California, Dec. 28, 1943.

NEWHOUSE AND SAYRE., INC.

By /s/ L. J. HOAGLAND K

Furriers Customers

A.P. \$116.92

Values at Risk:

September, 1943	\$ 75,500.00 @ .1008	\$ 76.10
October	40,500.00 @ .1008	40.82
	<hr/>	<hr/>
	\$116,000.00	\$116.92

All other terms and conditions of this policy remain unchanged.

Attached to and forms part of Policy No. FC 1824 of Home, issued to Barnes-Woodin Fur Dept. Dated at San Francisco, California, December 28, 1943.

NEWHOUSE AND SAYRE, INC.,

By /s/ L. J. HOAGLAND. K

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 1—(Continued)

Furriers Customers

A.P. \$10.58

Values at Risk—November, 1943

\$10,500.00 @ .1008 \$10.58

All other terms, limits and conditions of this policy remaining unchanged.

This slip is attached to and forms part of Policy No. F.C. 1824 of the Home Insurance Company, issued to Barnes-Woodin Fur Dept. Dated at San Francisco, California, May 22, 1944.

NEWHOUSE AND SAYRE, INC.,

By /s/ L. J. HOAGLAND. K

Q. Mr. Kirkevold, did the Barnes-Woodin Company have a fire? A. Yes, they did.

Q. Do you know the date?

A. Well, it was on May the 9th, 1944, at approximately 5:30 in the evening, or a few minutes thereafter—something like that.

Q. Did you have coats destroyed? A. Yes.

Q. Some that you owned yourself? A. Yes.

Q. And did you also have customers coats destroyed? A. Yes.

Q. Pursuant to said loss of coats, did you file a proof of loss with the Home Insurance Company?

A. I did.

(Testimony of Meryl Kirkevold.)

Q. I hand you Plaintiff's identification 2. Is that the proof of loss you filed, or a copy of it?

A. Yes, it is.

Mr. Velikanje: We offer it in evidence.

Mr. Hutcheson: No objection.

The Court: It will be admitted in evidence.

(Whereupon, proof of loss referred to, was then received in evidence and marked Plaintiff's Exhibit number 2.)

PLAINTIFF'S EXHIBIT No. 2

PROOF OF LOSS

To: The Home Insurance Company of New York.
Policy No. FC-1824.

By the above-named policy of insurance you insured Meryl Kirkevold, d.b.a. Barnes-Woodin Fur Dept., against loss or damage upon the property described as Furriers' Customers Certification Endorsement and Furriers' Customers Custody Rider, according to the terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.

On the 9th day of May, 1944, about the hour of 5:30 p.m., a loss was sustained which, to the best of my knowledge and belief, was a fire believed to be the result of defective wiring in the building. That at the time of the loss, or damage, the said property was located at the Barnes-Woodin Fur Department at 301 East Yakima Avenue, Yakima, Washington,

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

and was in the custody of Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, and belonged to customers, the same having been left in the care and custody of said department for storage and/or repairs.

That the interest protected by this policy and for which claim is made, is that of Bailee. Since the said policy was issued, there has been no assignment thereof, or change of ownership, use, possession, designation or exposure of the property described or of your insured's interest therein. That the loss as suffered is set forth under an itemized statement attached hereto and referred to as "Exhibit A", being a list of customers, item destroyed, value and indication whether in storage or held for repairs; That all items marked "O.P." are covered under Furriers' Customers Certification Endorsement; that the items marked "Ins." are to the best belief insured under a Floater Policy in addition to the policy herein; that the values as set forth in said Exhibit are the actual values of the item destroyed or else amount of designated value.

That there is also attached to said Proof of Loss "Exhibit B", being extension of time granted for filing Proof of Loss under policy.

You are hereby requested and authorized to make payment to Meryl Kirkevold, and in consideration of such payment said Company will forever be discharged from all further claim by reason of said

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

loss and damage, leaving Seventy Thousand Two Hundred Fifteen Dollars (\$70,215.00), only in force under said policy.

In consideration of the payment of this sum the insured will subrogate the Company to the amount of such payment to all rights of recovery for such loss or expense, and the insured further agrees upon demand to execute all documents required and to cooperate with the Company in prosecuting all actions to effect such recovery, and the Company is hereby authorized to commence and prosecute any necessary action or proceedings in the name of the insured or the company or of any person or persons to whom the Company may assign its claim hereunder for the purpose of effecting collection of the amount above mentioned.

The insured further agrees to notify the Company in case of any recovery of the property for which claim is being made hereunder, and agrees to turn over to the Company any such recovery which may be made or reimburse the Company to the extent of the payment for such property which may be recovered.

The said loss did not originate by any act, design or procurement on part of insured, nor on the part of anyone having any interest in the property insured, or in the said Policy of Insurance; nor in consequence of any fraud or evil practice done or suffered by said insured; that nothing has been done

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

by or with privity or consent of insured to violate the conditions of the Policy, or to render it void; and that no articles are mentioned herein or in attached schedules but such as were in the building damaged or destroyed, and belonging to and in the possession of the said insured at the time of the said loss; that no property saved has been in any manner concealed, and that no attempt to deceive the said Company as to the extent of said loss or otherwise has in any manner been made. Any other information that may be required will be furnished on call and considered a portion of these proofs.

It is further understood and agreed that all bills, invoices, schedules and statements made by the insured and attached to this Proof of Loss are to be incorporated into this proof, and are hereby duly sworn to and made a part hereof.

Dated at Yakima, Washington, this 18th day of August, 1944.

/s/ MERYL W. KIRKEVOLD,
Insured.

Subscribed and Sworn to before me this 18th day of August, 1944.

[Seal] /s/ FREDERICK VELIKANJE,
Notary Public in and for the State of Washington,
residing at Yakima.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

EXHIBIT "A"

Value	Owner	Item	
75.00	Albrecht, Mrs. Earnest	Brown Lapin	Rej
150.00	Andrews, Mable	Sealine	S
180.00	Arteel, Mrs. W. J.	Marmot	S
100.00	Babcock, Mrs. Ralph	Grey Squirrel Locke	S
75.00	Bair, Mrs. Howard	Coney	Rej
281.67*	325.00 Balke, Mrs. Emma	Squirrel Locke	Rej
200.00	Basey, Mrs. Grace	Black Caracul	S
200.00	Baur, Hattie	Caracul	S
100.00	Beauchene, Mrs. J. A.	Black Caracul	Rej
200.00	Beerman, Mrs. W. H.	O.P. Canadian Squirrel	S
200.00	Belaire, Mrs. Victor	Ins. Canadian Squirrel	S
200.00	Bell, Doris Benoit	Beaver	S
200.00	Bitter, Mrs. Gregory	O.P. Northern Muskrat Black	S
200.00	Bloxom, Mrs. Merritt	Ins. Northern Muskrat Belly	S
150.00	Bobst, Mrs. Mae	Brown Coney	S
150.00	Bodine, Florence	Black Caracul	S
200.00	Brimmer, H. V.	Brown Squirrel Locke	S
185.00	Brown, Mrs. Fred F. Bayson [Peneilled]	Brown Squirrel Locke	S
125.00	Burke, Barbara G.	Southern Muskrat Back	S
200.00	Busby, Mrs. Thomas	Grey Kid Caracul	S
200.00	Buttke, W. H.	Northern Muskrat Back	S
150.00	Campbell, Helen	Ins. Grey Persian Paw	S
150.00	Carman, Mrs. Rex	Black Pony	S
150.00	Cast, Mrs. Harold	Sealine	Rej
150.00	Chadwick, R. E.	Hudson Seal	S
100.00	Chance, May	Persian Paw	S
150.00	Clarke, Glen L.	Silver Muskrat	S
150.00	Clements, James	Cloth coat—Fox collar	Re
250.00	Conkey, A. L.	Brown Squirrel Locke	S
100.00	Cox, Alice	Brown Coney	S
200.00	Cronholm, Mrs. A. L.	Northern Muskrat Belly	S
200.00	Dasdice, J. A.	Squirrel Locke	S
500.00	Dawson, Mrs. F. C.	Red Fox Stroller	S
100.00	Dawson, Mrs. F. C.	Black Caracul	S
150.00	Densmore, Mrs. W.	Brown Check Lamb	S

* Figures peneilled in margin.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

Value	Owner		Item	
150.00	Dewar, Gladys N.		Natural Muskrat	St.
200.00	Dormaier, C. C.		Pechaniki	St.
200.00	Draper, Wm. C.		Black Persian Paw	St.
50.00	Edwards, Mrs. Floyd C.		Brown Coney	St.
200.00	Erickson, O. H.	Ins.	Northern Muskrat Back	St.
00.00*	150.00 Eschback, Mrs. Ed.		Sealine	Rep.
200.00	Etl, Lillian		Northern Muskrat Back	St.
125.00	Evans, Mrs. Earl		Sealine	St.
200.00	Eyman, Mrs. Chas.		Hudson Seal	St.
200.00	Fetherstone, Mrs. J. E.		Brown Squirrel Locke	St.
50.00	Fiebelkom, Hazel		Child's Lapin	Rep.
250.00	Flater, Mrs. Mabel		Hudson Seal	St.
200.00	Fleming, Mrs. Del	Ins.	Black Alaska Seal	St.
100.00	Fleming, Mrs. Del		Natural Silver Muskrat	St.
300.00	Foran, Ruth		Leopard	St.
200.00	Fortier, Mrs. Geo.	O.P.	Northern Muskrat Back	St.
150.00	Fox, Mrs. H. R.		Black Caracul	St.
200.00	Fraser, Mrs. Ronald		Grey Persian Lamb	St.
150.00	Fuqua, A. E.		Black Pony	St.
150.00	Gannon, Gertrude		Sealine	St.
	out Gaudette, Pauline		Grey Caracul	Rep.
150.00	Golty, W.		Hudson Seal	St.
150.00	Griffeth		Marmot	St.
375.00	Hagne, Harold J.		Natural Muskrat	Rep.
100.00	Hall, Angeline		Black Caracul	Rep.
175.00	Hamilton, J. C.		Muskrat Northern Belly	St.
350.00	Hanratty		Brown Russian Squirrel	Rep.
200.00	Harbin, Clara	Ins.	Southern Muskrat Back	St.
5.00*	300.00 Harnden, W. G.		Black Chek. Lamb	Rep.
150.00	Hartman, Dean		Brown Pony	St.
200.00	Hayes, C. P.		Northern Muskrat	St.
200.00	Hawk, C.		1 pair Silver Foxes	St.
150.00	Herrette		Squirrel Locke	St.
200.00	Hillmer, Beatrice	O.P.	Marmot	St.
200.00	Holtzinger, C. R.		Russian Squirrel	St.
75.00	Hornsberger, A.		Black Coney	Rep.
180.00	Jarvis, Helen		Squirrel Locke	St.
150.00	Johnson, Fred E.		Cloth coat—Fox collar	St.

* Figures pencilled in margin.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

Value	Owner		Item	
	140.00 Jahr, Edna C.		Grey Chek. Lamb	
350.00*	375.00 Jones, M. W.	O.P.	Northern Muskrat Back	
	100.00 Junker, Elizabeth		Brown Coney Flank	
	200.00 Kinney, C. H.		Brown Squirrel Locke	
	225.00 Kiou, Mrs. Vernon		Black Pony	
	200.00 Knight, Ida		Hudson Seal	
	200.00 Krause, Mary Alice	O.P.	Natural Opossum	
	200.00 Leach, E. E.	O.P.	Northern Muskrat	
	375.00 Lindsey, L. C.		Muskrat	R
	200.00 Lisle, Ivan B.		Brown Caracul	
	500.00 Logozzo, Elsie	O.P.	Canadian Squirrel	
	200.00 Lowenthal, Carl	O.P.	Northern Muskrat Back	
	150.00 Lyon, W. F.		Grey Chek. Lamb	
	125.00 Mace, Clark		Black Pony	
	100.00 Magee, Patricis		Skunk Opossum	
	200.00 Martinez, M. J.		Muskrat	
	30.00 McClure, Mrs. Wm.	Ins.	2 Marten skins	
	150.00 McLure, Mrs. Wm.	Ins.	Muskrat Southern Back	
	200.00 McCorkindale, Elaine	O.P.	Natural Muskrat	
	200.00 McGilvery, G. F.	Ins.	Natural Russian Squirrel	
	200.00 Meek, Eleanor		Muskrat Northern Back	
	200.00 Mercke, J. W.		Persian Lamb	
	200.00 Messer, Lucille H.		Grey Caracul	
	600.00 Metyger, Bee		Hudson Seal	R
	300.00 Miller, H. R.		Muskrat, Southern Back	
	75.00 Mixon, Betty		Red Fox Jacket	
	100.00 Mixon, Louise		Russian Squirrel Brown	
	150.00 Moore, J. D.		Scaline	R
	325.00 Morrill, Florence		Peschaniki	R
150.00*	200.00 Marse, Mrs. Opal		Skunk	
	100.00 Munsil, L. W.		Black Caracul	
	150.00 Nelson, Mrs. Elmer		Black Chek. Lamb	
	600.00 Odell, Harry		Hudson Seal	E
75.00*	100.00 Orth, J. E.		Pale Red Fox Skin	F
	400.00 Palmer, F. C.		Alaska Seal Coat	
	100.00 Palmer, F. C.		2 collars & Hud. Seal Cape	
	135.00 Patnode, Mrs. Mose		Beaverette	

* Figures pencilled in margin.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

Value	Owner		Item	
200.00	Peterson, Laura		Squirrel Paw	St.
100.00	Pollard, H. E.		Sealine	St.
150.00	Poulter, Merle		Black Caracul	St.
100.00	Pulos, Ada		Brown Coney	St.
200.00	Ray, Mabel Miller	Ins.	Man's Muskrat	St.
200.00	Reich, Mrs. Wm.		Marmot	St.
200.00	Reischl, Irene		Muskrat Northern Belly	St.
200.00	Richards, Gordon		Northern Muskrat Back	St.
350.00	Riggs, Dorothy	Ins.	Brown Squirrel Locke	Rep.
200.00	Ritchie, Clarence		Northern Muskrat Back	St.
75.00	Robinson, K. G.		Beaverette	St.
90.00	Rollis, Mrs. Harry		Guanaco Jacket	St.
200.00	Ross, Nan		Northern Muskrat Belly	St.
200.00	Ryker, Rodney		Black Chek. Lamb	St.
200.00	Schmidt, G. A.		Natural Muskrat & Hat	St.
200.00	Schmidt, Rudy		Muckrat Southern Back	St.
200.00	Schoonover, Jack		Weasel	St.
75.00	Shaw, Verda Gayle		Opossum Jacket	St.
200.00	Shirran, W. C.		Hudson Seal	St.
150.00	Smith, Mabel G.	Ins.	Hudson Seal	St.
11.67*	250.00 Souther, Frank		Squirrel Locke	Rep.
	200.00 Spinner, H. R.	Ins.	Brown Alaska Seal	St.
	200.00 { Stanley, Dorteia	O.P.	Ermine	St.
	{ Stanley, Dorteia	O.P.	5 Kolmoky Skins	St.
	150.00 Stanley, Gladys		Natural Muskrat So. Back	St.
	100.00 Stoltenow, B. W.		Brown Coney	St.
	350.00 Stuart, Agnes M.	Ins.	Black Chek. Lamb	Rep.
	250.00 Stumpf, John H.		Baby Seal	St.
	100.00 Taliaferro, Thelma		Brown Chek.	St.
	200.00 Thacker, Cecil		Pechanki	St.
	100.00 Thomas, David G.		Brown Squirrel Locke	St.
	200.00 Thomas, Elmer		Black Caracul	St.
	200.00 Thompson, J. C.		Northern Muskrat Back	St.
5.00*	170.00 Tilton, Mrs. Rex		4 Marten Skins	Rep.
	200.00 Timpke, Glen D.		Marmot	St.
	200.00 Turnell, Erma	Ins.	Persian Lamb Black	St.
	350.00 Verd, Mrs. Chas.		Northern Muskrat Belly	Rep.

* Figures pencilled in margin.

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

Value	Owner	Item
150.00	Vivian, James	Sealine
225.00	Wait, Carlyle	Pony
200.00	Walsh, C. J.	Canadian Squirrel
250.00	Warner, A. K.	Ins. Muskrat
200.00	Warner, Harold	Brown Squirrel Locke V
200.00	Wiehl, Wright	Grey Squirrel Locke
150.00	Williams, D. A.	Black Caracul
200.00	Wilson, Ed.	Hudson Seal
100.00	Wright, Delbert	Sealine
350.00	York, Paul F.	Muskrat
200.00	Bryon, Irene	O.P. Grey Squirrel Paw

 29,785.00

EXHIBIT "B"

Fire Companies' Adjustment Bureau, Inc.

Refer to File No. YAK-4-452-M August 2, 1944

Mr. Meryl W. Kirkevold,
 c/o Velikanje & Velikanje,
 Miller Bldg, Yakima, Wash.

Dear Sir:

Without at this time either admitting or denying liability of waiving any of its other rights and defenses under all of the terms and conditions of its Policy No. FC 1824 issued in the name of Meryl Kirkevold, d.b.a. Barnes-Woodin Fur Department, the Home Insurance Company of New York hereby extend the time for filing a detailed sworn proof of loss, as provided in Par. 3, General Conditions of said Policy No. FC 1824, for any alleged claim that may have been occasioned by reason of fire that oc-

(Testimony of Meryl Kirkevold.)

Plaintiff's Exhibit No. 2—(Continued)

curred May 9th, 1944, from 90 days from date of said fire, to September 10th, 1944.

This letter refers specifically to the extension of time for filing said detailed sworn proof of loss as required by Paragraph 2, General Conditions of said Policy No. FC 1824. It is sent you, without any waiver of any right or defenses the said Home Insurance Company may hereafter accrue to it under all other provisions of said Policy No. FC 1824, or under the Statutes of the State of Washington or under the Common Law. Such rights and defenses being hereby specifically reserved.

Yours very truly,

L. M. McKINLEY,

Adjusting Representative for the Home Insurance
Co. of New York.

LMM/a—c-SF—c-Co.

Q. Mr. Kirkevold, pursuant to—attached to the proof of [42] loss is a list of the coats what were destroyed. Will you look this over, and I will refer to the individual ones on the coat losses.

Mr. Velikanje: If Your Honor please, we have here a box of receipts and things which we want to put in as one identification, but we will have to refer to the individual ones. I believe the best way would be to do it in that way. There may be

(Testimony of Meryl Kirkevold.)

some papers and things I may want to take out as we go along, but I want to submit these as one exhibit. I believe it is agreeable to Mr. Hutcheson.

Mr. Hutcheson: I have examined them, and I have no objection to their being offered in evidence.

The Court: They will be marked as one exhibit and admitted as such.

The Clerk: The plaintiff's Exhibit 3.

(Whereupon, receipts referred to was then received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Velikanje: Your Honor, I may state that it has been admitted that the assignments are all valid in these that we are now referring to in this identification, 3.

The Court: Yes.

The Clerk: Exhibit 3, that is admitted in evidence. [43]

Q. Mr. Kirkevold, you have before you Exhibit 2, the proof of loss with the schedule. On that proof of loss, the first coat that is listed, Mrs. Earnest Albrecht, on which you have a valuation of \$75.00. Was that coat destroyed?

A. Yes, it was.

Q. I hand you a portion of Exhibit 3, and would like to have you look at that, on the receipt that was issued to Mrs. Albrecht. Was there a valuation placed on that coat? A. No.

Q. There was no valuation placed?

A. No.

(Testimony of Meryl Kirkevold.)

Q. Did you set a valuation on your proof of loss? A. Yes.

Q. What valuation? A. \$75.00.

Q. How did you reach that valuation?

A. Well, by determining age and style—age of the coat by the style, and condition.

Q. Were you familiar with all of these coats?

A. Most of them, yes.

Q. And you feel that was a reasonable value of that coat at that time? A. Yes. [44]

Q. Reasonable market value?

The next one you have listed is Mable Andrews. Was a valuation placed on that coat?

A. Yes, the valuation was placed on that coat at the time it was brought in.

Q. What amount? A. \$150.

Q. In your opinion is that a reasonable valuation of that coat?

A. That was a fair valuation, yes, sir.

Q. The next coat is Mrs. W. J. Arteel. Showing you the receipt is there a valuation placed upon that coat?

A. The valuation was placed, yes, at the time it was brought in.

Q. What amount? A. \$180.

Q. In your opinion was that a fair valuation?

A. Yes.

Q. The next coat that is listed is Mrs. Ralph Babcock. Showing you the receipt, is that a valuation— A. Yes.

Q. What amount? A. \$200.

(Testimony of Meryl Kirkevold.)

Q. Is that a fair valuation of that coat?

A. No, I feel as though that coat was over valued, and we [45] have made a new valuation of a hundred dollars.

The Court: How much?

The Witness: One hundred dollars.

Q. You feel one hundred dollars was a fair valuation? A. Sufficient.

Q. That is the amount you have in your proof of loss? A. Yes.

Q. Though she had placed a valuation of two hundred dollars on her receipt? A. Yes.

Q. The next coat is Mrs. Howard Bair?

A. Yes.

Q. Showing you a receipt, was there a valuation placed upon that coat?

A. No, there was not.

Q. Did you place a valuation on that coat?

A. Yes, I did.

Q. What valuation? A. \$75.

Q. You feel that was a fair and reasonable valuation of that coat in its condition at that time?

A. Yes, I do.

Q. The next coat was Mrs. Emma Balke. Does that coat have a valuation placed upon it?

A. No, no. [46]

Q. Did you place a valuation on that coat?

A. Yes, we did.

Q. And of what valuation?

A. Well, on this proof of loss, I think the valua-

(Testimony of Meryl Kirkevold.)

tion has been cut down from the original one, hasn't it?

Q. What valuation did you place on the proof of loss?

A. In the proof of loss we put replacement of a new coat at time of settlement, I think it was.

Q. Well, did you think that valuation was high?

A. A little high.

Q. What do you think was the true valuation—market valuation of that coat?

A. It would be closer to two hundred and eighty dollars, instead of three hundred and twenty-five.

Q. Two hundred and eighty. Do you feel that is a fair valuation of that coat? A. Yes.

Q. The next coat is Mrs. Grace Bassey. That has a valuation listed of \$200? A. Yes, sir.

Q. Would that be a fair valuation of that coat?

A. Yes.

Q. Mrs. Hattie Baur, you show in your proof of loss a valuation of \$200. Is there any proof or value listed on the receipt? [47]

A. No, there was not.

Q. What would you contend would be a reasonable value of that coat?

A. Well, a coat of that type would be worth at least \$200.

Q. Worth at least \$200? A. Yes.

Q. That is the amount that you have placed in your proof of loss? A. That is right.

Q. You feel that is a fair valuation of that coat.

(Testimony of Meryl Kirkevold.)

Mrs. A. J. Beauchene. Was there any valuation placed upon that coat? A. No valuation.

Q. What did you place on that coat?

A. We—I placed a valuation of a hundred dollars.

Q. Do you feel that was a fair valuation?

A. Yes.

Q. Mrs. W. H. Beerman. What valuation was placed on that coat?

A. There was a valuation of \$200 placed on that coat.

Q. I remark at that time, that on that coat had Mrs. Beerman taken out a certificate policy?

A. Yes, she had.

Q. In that amount had the valuation been fixed in the [48] certificate policy? A. \$450.

Q. \$450? A. Yes, sir.

Q. In your proof of loss, however, you listed that only as \$200, is that correct? A. Yes.

Mr. Velikanje: Your Honor, at this time I remark as to the certificate policies. It has been admitted in pleadings these parties holding these had made due proof of loss individually on their certificate, and they have been assigned to Mr. Kirkevold.

The Court: The certificate policies were taken out with the defendant's company?

The Witness: That is correct.

Mr. Velikanje: That is correct, yes.

Q. Do you feel a valuation of \$450 on that coat was reasonable? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Mrs. Victor Belaire, was a valuation placed upon that coat? A. Yes, sir, \$350.

Q. What amount had you listed in the proof of loss? A. \$200. [49]

Q. And what amount had she taken out by certificate? A. Three hundred and twenty-five.

Q. And she had a certificate for three hundred and twenty-five? A. Yes.

Q. But the valuation of the receipt was three hundred and fifty? A. Yes.

Q. But you had listed in your proof of loss only the two hundred? A. Yes, sir.

Q. Mr. Kirkevold, I might ask you why did you list that at \$200 on your proof of loss?

A. Well, the reason for the \$200 listing was, we had a minimum storage charge of three dollars and a half, and we took valuations up to two hundred dollars for that three and a half, and when the customer would specify having other insurance, we just gave them the maximum for the three and a half service—or I mean a service charge for taking care of it.

Q. So far as your monthly listing then, on this coat, was listed with the company as \$200?

A. Yes, sir.

Q. But you paid them additional premium for this certificate policy? [50] A. Yes.

Q. Doris Benoit Bell, valuation listed——

A. Yes, \$200.

Q. Do you feel that is a reasonable valuation of that coat? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Mr. Kirkevold, many of these coats, would they be valued in excess of that?

A. No, as far as listing on our proof of loss, I wouldn't say it was fair except in cases where the customer may have paid more for her coat, and did not realize the value of it, or——

Q. But, if they wanted more than \$200 insurance, they had to pay an additional premium?

A. Yes.

Q. But this was the amount that you carried upon their coats? A. Yes.

Q. And for additional insurance they would have to carry an additional amount?

A. That is right.

Q. Mrs. Gregory Bitter, is there a valuation listed? A. Yes, \$200.

Q. Would you say that was a reasonable valuation of the coat? [51]

A. Well yes, it was the maximum for the storage charge. She had other insurance, though.

Q. She had an owner's policy? A. Yes.

Q. Do you have that policy?

A. Well, that is one of those that had the insurance. We paid four hundred.

Q. What would you say the reasonable value of her coat was?

A. It was a new muskrat coat. She had just purchased it the season before, and had only worn it during late in the season. She purchased it in May, so it had not been worn over maybe four or five months.

(Testimony of Meryl Kirkevold.)

Q. What was the reasonable value of that coat?

A. Well, \$400.

Q. \$400?

A. Yes. I am sure that is what it was.

Q. As a matter of fact, Mr. Kirkevold, in your settlement with her you paid her cash \$400?

A. Yes.

The Court: Well then, do I understand the company, according to your contention, had an insurance to the extent of \$400, \$200 in the blanket policy and \$200 additional.

Mr. Velikanje: No, \$200 additional in the certificate. [52]

Mr. Hutcheson, do you happen to have copies of the certificates?

Mr. Hutcheson: No.

Mr. Velikanje: Do you have a list of the certificate holders? Is her name listed in it—that is Bitter? Do you have her listed as a certificate holder?

Mr. Hutcheson: We don't have the certificate. However, I listed her and one other—yes, she is listed as one of the certificate holders, and which has been admitted, Your Honor.

Q. The next one is Mrs. Merritt Bloxom, Junior?

A. That was valued at the time the coat was brought in.

Q. Your receipt showed the valuation?

A. Yes, \$200.

The Court: How much?

(Testimony of Meryl Kirkevold.)

The Witness: \$200.

Q. Do you feel that is a reasonable valuation of that coat? A. Yes.

Q. Mrs. Mae Bobst? A. Mae Bobst?

Q. Valuation listed?

A. A hundred and fifty dollars at the time we got it.

Q. Do you feel that is a fair valuation of it?

A. Yes.

Q. Florence Bodine?

A. Yes, that was valued at the time she brought the coat in, \$150.

Q. In your opinion is that a fair valuation?

A. That is a fair valuation.

Q. Mrs. H. V. Brimmer?

A. That was valued at the time she brought the coat in at \$200.

Q. Is that a fair valuation? A. Yes, sir.

Q. Mrs. Fred F. Brown?

A. That was valued at the time that the coat was brought in at \$185.

Q. Do you feel that is a fair valuation?

A. Yes.

Q. Irene Bayson?

A. Irene Bayson, that was valued at the time at \$200.

Q. Do you feel that was a fair valuation on that coat? A. Yes, it is.

Q. I note in your receipt, that you paid her \$400. Did she have a certificate policy.

A. Yes, she had a policy.

(Testimony of Meryl Kirkevold.)

Q. She had a certificate policy. Do you have that name listed, Irene Bayson? [54]

Mr. Hutcheson: Yes.

Q. And then, what would you say would be the fair valuation of that coat?

A. Well, hers was a new coat that had been purchased the season before, and she put it in under the minimum. We just automatically put down a valuation of two hundred. That was the maximum she could get for her three and a half, because she had other insurance.

Q. But, what do you feel was the fair valuation of that coat. A. What we paid her was \$400.

Q. \$400? A. Yes.

Q. That was the amount of her certificate?

A. Yes.

Q. Barbara G. Burke?

A. Yes, that was valued at a \$125.

Q. And that is what you paid her in settlement?

A. Yes.

Q. You feel that was a fair valuation of that coat? A. Yes.

Q. Mrs. Thomas Busby?

A. Busby, that is right.

Q. Does that have a valuation listed?

A. A valuation of two hundred at the time she brought it in. [55]

Q. Do you think that is a reasonable valuation?

A. Yes.

Q. Mrs. W. H. Buttke?

(Testimony of Meryl Kirkevold.)

A. That was valued at two hundred at the time she brought the coat in.

Q. Do you feel that was a fair valuation?

A. Yes.

Q. Helen Campbell?

A. That was valued at the time it was brought in at a hundred and fifty dollars.

Q. And you made settlement with her for \$150?

A. Yes, sir.

Q. You feel that was a fair valuation?

A. Yes.

Q. Mrs. Rex Carman? A. Yes.

Q. I do not find a receipt on this coat?

A. That was——

Q. Do you know if there is.

A. There should be a receipt. Well, the receipt might have been burned.

Q. Were some of your receipts burned in the loss? A. Yes, there were.

Q. But, a receipt was issued for that coat?

A. That is right. [56]

Q. To the best of your knowledge was a valuation placed upon that receipt?

A. Yes, a valuation was placed at a hundred and fifty dollars.

Q. Do you feel that was a fair valuation for that coat? A. Yes.

Q. Mrs. Harold Cast? A. Yes.

Q. Was a valuation placed upon that coat?

A. No, that was the—there was no valuation placed on it.

(Testimony of Meryl Kirkevold.)

Q. There was none placed upon it at all?

A. No.

Q. What in your opinion was a reasonable valuation of that coat?

A. About a hundred and fifty dollars.

Q. Do you feel that was a reasonable market value of that coat? A. I do.

Q. Mrs. R. E. Chadwick?

A. That was valued at a hundred and fifty dollars at the time she brought the coat in.

Q. Was that a reasonable value of that coat?

A. Yes.

Q. What was that, an older coat?

A. Yes, it was probably three or four or five years old. [57]

Q. A Hudson Seal coat is much more expensive than that, as a new coat? A. Yes.

Q. But, you feel a hundred and fifty dollars is a reasonable valuation. Mae Chance?

A. That was valued at the time it was brought in at \$100.

Q. Do you feel that was a reasonable valuation?

A. I do.

Q. Mrs. Glen L. Clarke?

A. That was valued at the time it was brought in at a hundred and fifty dollars.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes, I do.

Q. Mrs. James Clements' cloth coat with Fox collar? A. Yes.

Q. Does that have a valuation listed?

(Testimony of Meryl Kirkevold.)

A. No, no valuation listed.

Q. What do you feel was a reasonable valuation of that coat? A. \$150.

Q. Is that what you listed in your proof of loss?

A. Yes.

Q. And is that what you paid her in settlement? [58]

A. That is what I paid her in settlement, yes, sir.

Q. A. L. Conkey? A. Yes, sir.

Q. What valuation?

A. That was valued at two hundred and fifty dollars at the time it was brought in.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes, I do.

Q. Alice Cox—

The Court: Was a coverage on that over the \$200?

The Witness: We valued hers at \$250. She paid the storage and extra premium for the extra fifty dollars.

Q. In your return to the insurance company, did you list that as two hundred and fifty dollars?

A. Yes.

Q. In your monthly report? A. Yes.

Q. Alice Cox?

A. That coat was not valued at the time—Yes, it was too, valued at a hundred dollars.

Q. Is that what you have in your proof of loss?

A. Yes. [59]

(Testimony of Meryl Kirkevold.)

Q. Do you feel that is a reasonable value of that coat? A. I do.

Q. Mrs. A. L. Cronholm?

A. That was valued at \$200.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes, I do.

The Court: You said \$200?

The Witness: Yes.

Q. Mrs. J. A. Dasdice?

A. That was valued at two hundred dollars at the time it was brought in.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes, I do.

Q. Mrs. F. C. Dawson?

A. That was valued at the time it was brought in at five hundred dollars. It was a red fox. That included—that was two—let's see she had another article valued at a hundred dollars, a black Caracul coat, and I believe she had another Caracul valued at a hundred dollars but it was not harmed by fire.

Q. In other words, she lost a Black Caracul that she had valued in your receipt at one hundred dollars and a Red Silver at five hundred dollars?

A. Yes.

Q. She had paid additional premium for that?

A. Yes, she did.

Q. You made a settlement with her, a cash settlement of \$600. A. I did, yes, sir.

Q. Do you feel that was a reasonable value of that? A. I do.

Q. Of those two coats. Mrs. W. Desmore?

(Testimony of Meryl Kirkevold.)

A. That was valued at the time it was brought in for a hundred and fifty dollars.

Q. And you made a settlement with her for a hundred and fifty dollars. A. Yes, sir.

Q. You feel that was a reasonable valuation of that coat? A. Yes.

Q. Gladys N. Dewar?

A. That was valued at the time it was brought in, a hundred and fifty dollars.

Q. Do you feel that was a reasonable valuation of it? A. I do.

Q. That was the amount of settlement you made with her? A. Yes.

Q. Mrs. C. C. Dormaier, valuation?

A. Yes, that was valued at the time it was brought in. [61]

Q. How much? A. \$200.

Q. You made a cash settlement of \$200 with her?

A. Yes, sir.

Q. You feel that was a reasonable value?

A. I do.

Q. Mrs. William C. Draper?

A. That was valued at the time it was brought in for two hundred dollars.

Q. And you made a cash settlement of two hundred dollars? A. Yes.

Q. And you feel that is a reasonable valuation?

A. I do.

Q. Mrs. Floyd C. Edwards?

A. Yes. That was valued at the time it was brought in for \$50.

(Testimony of Meryl Kirkevold.)

Q. You made a cash settlement of \$50?

A. Yes, sir.

Q. You feel that is a reasonable valuation?

A. Yes.

Q. Mrs. O. H. Erickson?

A. Yes, that was valued at the time it was brought in for \$200. I believe she had other insurance.

Q. Do you feel that was a reasonable valuation of this coat? [62]

A. No—Oh, that was our valuation of it, but she had a valuation in excess. I think with another company.

Q. She had insurance with another company?

A. Yes.

Q. You have secured an assignment to another company? A. Yes.

Q. You feel that valuation of \$200 is below the reasonable valuation of that coat? A. Yes.

Q. Mrs. Ed. Eschback?

A. That was valued—I don't think that it was. Yes, it was valued at the time it was brought in for \$150 or \$100, I mean.

Q. \$100? A. Yes.

Q. Well then, that amount on the Eschback should be changed to one hundred?

A. One hundred instead of one fifty.

Q. You feel that a hundred dollars is a reasonable value? A. Yes.

Q. Lillian Etl?

(Testimony of Meryl Kirkevold.)

A. Yes, it was valued at the time it was brought in at \$200.

Q. Do you feel that was a reasonable valuation of that coat? [63] A. I do.

Q. Mrs. Charles Eyman?

A. Yes, that was valued at the time for \$200.

Q. Do you feel that was a reasonable valuation of that coat? A. Yes.

Q. Mrs. John E. Fetherstone?

A. That was valued at the time it was brought in for \$200.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. Hazel Fiebelkom?

A. That was valued at \$25.

Q. Just a child?

A. Just a child—baby coat.

Q. Do you think that was a reasonable value of that coat? A. Yes.

Q. Mabel Flater?

A. That was valued at the time it was brought in for two hundred and fifty dollars, and that was—I would say a very fair valuation.

Q. A very fair valuation. She paid an additional premium for that?

A. Yes, for the additional fifty dollars.

Q. Mrs. Del. Fleming?

A. She had two coats that were valued at the time they [64] were brought in.

Q. At what value?

(Testimony of Meryl Kirkevold.)

A. The one coat was valued at two hundred and one—the other coat at one hundred dollars.

Q. And do you feel those were reasonable values, also? A. Yes.

Q. That would be \$300, is that what you had listed in your proof of loss? A. Yes.

Q. Ruth Foran?

A. That was valued at the time it was brought in.

Q. At how much? A. At \$300.

Q. Do you feel that was a fair valuation?

A. Yes.

Q. In fact, you made a cash settlement with her?

A. For \$300.

Q. Mrs. George Fortier?

A. That was valued at the time it was brought in for \$200.

Q. However, she had a certificate policy?

A. Yes.

Q. In what amount?

A. In the amount of \$225.

Q. And that was the amount you paid her, \$225?

A. Yes. [65]

Q. That she had paid additional premium for that certificate? A. Yes.

Q. What amount is listed in the proof of loss?

A. Three hundred dollars.

Q. The proof of loss is listed at three hundred, and that should be reduced to two hundred and twenty-five?

A. Two hundred and twenty-five, yes, sir.

(Testimony of Meryl Kirkevold.)

Q. Mrs. H. R. Fox?

A. That was valued at the time it was brought in for a hundred and fifty dollars.

Q. Do you feel that was a reasonable valuation for that coat? A. Yes.

Q. Mrs. Ronald Fraser?

A. That was valued at the time for \$200.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. Mrs. A. E. Fuqua?

A. That was valued at a hundred and fifty dollars.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. You made a cash settlement with her at that time? A. Yes.

Q. Mrs. Gertrude Gannon?

A. That was valued—no, that was not—no valuation [66] placed on it.

The Court: The order in which these names appear here, on these releases, would be Mrs. Glotz.

Mr. Velikanje: Instead of Mrs. Gannon?

The Court: Yes.

Mr. Velikanje: Mrs. Gannon follows does she?

The Court: Yes.

Q. Mrs. W. Glotz?

A. Yes, that was valued at the time she brought it in at a hundred and fifty dollars.

Q. You feel that was a fair valuation on the coat? A. Yes, sir.

Q. Gertrude Gannon?

(Testimony of Meryl Kirkevold.)

A. I believe that was not valued at the time it was brought in.

Q. There was no value placed on it?

A. No.

Q. What was the fair and reasonable value of this coat?

A. One hundred and fifty dollars.

Q. That is, you have listed it in your proof of loss? A. Yes.

Q. Were you familiar with that coat?

A. Yes.

Q. Mrs. A. J. Griffeth?

A. That coat was valued at the time it was brought in. [67]

Q. How much?

A. A hundred and fifty dollars.

Q. You have listed it in your proof of loss?

A. Yes.

Q. Do you feel that was a reasonable and fair value? A. Yes.

Q. Mrs. Harold J. Hague, was there a valuation placed on that coat?

A. No, not at the time it was brought in.

Q. What do you feel was the reasonable and fair valuation of that coat?

A. Three hundred and seventy-five dollars.

Q. What kind of a coat was it?

A. It was Natural Muskrat.

Q. You believe a fair valuation of that would be three hundred and seventy-five dollars?

A. I do.

(Testimony of Meryl Kirkevold.)

Q. Was that a new coat?

A. No, it was several seasons old.

Q. But still would have that valuation on it?

A. Yes.

The Court: Now, is this one of those that there was additional insurance——

Mr. Velikanje: I don't believe——

Q. Was that a coat in your shop for repair?

A. Yes, it was in there to be repaired, and some little thing on it at the time of the fire.

Q. In your report to the insurance company, what valuation was that coat listed?

A. Three hundred—yes, three hundred and seventy-five dollars.

Q. It would be listed at the reasonable value in your insurance company report? A. Yes.

Q. That is what you paid your premium on to the insurance company? A. That is right.

Q. Angeline Hall?

A. That was valued at the time it was brought in for a hundred dollars.

Q. And you feel that was a reasonable valuation? A. Yes.

Q. You made a cash settlement with her for a hundred dollars? A. Yes.

Q. Mrs. J. C. Hamilton?

A. That was valued at the time it was brought in for a hundred and seventy-five dollars?

Q. Was that a reasonable valuation?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. You made a cash settlement with her for that amount? [69] A. Yes.

Q. Agnes Hanratty?

A. That was valued at two hundred dollars.

Q. Was that the amount listed in your proof of loss? Do you feel that was a reasonable valuation?

A. No, that must be one of the coats that we have taken down the price, here.

Q. You feel that that—you have listed it at three hundred and fifty?

A. That was over valued.

Q. You feel that two hundred dollars should be the valuation on that?

A. Yes, that is what I paid her.

Q. Clara Harbin?

A. Now, the coat was valued at two hundred dollars at the time it was brought in.

Q. On this coat, however, she had other insurance and signed a release so you are making no claim for that? A. Yes.

Mr. Velikanje: That is correct, I think you secured the release on that.

Mr. Hutcheson: Yes, that release is in evidence.

Mr. Velikanje: Yes, there is a copy of it attached to that. [70]

Q. W. Harnden?

A. That was not valued. It was not valued at the time it was brought in.

Q. What in your opinion was the reasonable valuation?

(Testimony of Meryl Kirkevold.)

A. Well, a hundred and seventy-five dollars.
Is that the one——

Q. You have it listed here as three hundred dollars.
A. Yes, sir.

Q. But, you were able to make a cash settlement of a hundred and seventy-five dollars?

A. Yes.

Q. So that amount should be reduced to a hundred and seventy-five dollars?

A. A hundred and seventy-five dollars.

Q. Mrs. Dean Hartman?

A. That was valued at the time it was brought in for storage, a hundred and fifty dollars.

Q. You feel that was a reasonable valuation?

A. Yes.

Q. In fact, you made a settlement on that basis?

A. Yes.

Q. Mrs. C. P. Hayes?

A. That was valued at the time it was brought in for storage for two hundred dollars.

Q. You feel that was a reasonable valuation of that coat? [71]

A. Yes.

Q. Mrs. W. F. Herrette?

A. Yes, that was valued at the time it was brought in for storage at a hundred and fifty dollars.

Q. You felt that is a reasonable valuation?

A. Yes.

Q. You made settlement on that basis?

A. Yes.

Q. Beatrice Hillmer?

(Testimony of Meryl Kirkevold.)

A. That was valued at two hundred dollars at the time it was brought in.

Q. And you feel that was a reasonable valuation for that coat? A. Yes.

Q. Mrs. C. R. Holtzinger?

A. That was valued at two hundred dollars at the time it was brought in.

Q. You feel that was a reasonable valuation for that coat? A. Yes.

Q. Mrs. A. Hornsberger?

A. That was valued at the time it was brought in, seventy-five dollars.

Q. And you feel that was a reasonable valuation? A. Yes.

Q. And you made settlement on that basis? [72]

A. Yes, sir.

Q. Helen Jarvis?

A. That was valued at the time it was brought in for a hundred and eighty dollars.

Q. You feel that was a reasonable valuation?

A. Yes, sir.

The Court: A hundred and eighty dollars?

The Witness: Yes.

Q. Mrs. Fred E. Johnson?

A. That was valued at the time it was brought in for storage at a hundred and fifty dollars.

Q. You feel that was a reasonable valuation?

A. Yes.

Q. And you made a cash settlement with her on that basis?

The Court: You seem to have passed Edna Jahr.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: I have it right here.

Q. Edna C. Jahr?

A. That was valued at a hundred and forty dollars, at the time it was brought in for storage.

Q. You feel that was a reasonable valuation?

A. Yes, sir.

Q. You made a settlement with her on that basis? A. Yes.

Q. She was in the WAVES at the time? [73]

A. Yes.

Q. Mrs. M. W. Jones?

A. She had an insurance policy and we put the maximum for the storage charge on the coat.

Q. Well, she had a certificate policy?

A. Yes, and the policy I think was three seventy-five—fifty.

Q. The policy you had issued a policy with this company of three hundred and fifty dollars?

A. Yes.

Q. Elizabeth Junker?

A. Yes, that was valued at the time it was brought in for storage at a hundred dollars.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. Mrs. C. H. Kinney?

A. That was valued at the time it was brought in for storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. Yes, sir.

Q. You made a cash settlement with her on that basis? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Mrs. Vernon Kious?

A. That was valued at the time it was brought in for storage at two hundred and twenty-five dollars. [74]

Q. She paid an additional premium for that?

A. Yes.

Q. You feel that was a reasonable value?

A. Yes, I do.

Q. Ida Knight?

A. That was valued at the time it was brought in for storage at two hundred dollars.

Q. Do you feel that was a reasonable value?

A. I do.

Q. You made a cash settlement with her on that basis? A. Yes.

Q. Alice Mary Krause?

A. Yes, that was a valuation of two hundred dollars, was placed on her coat, which was a maximum for three and a half, but she carried an outside policy.

Q. The outside policy, however, was only for a hundred and fifty dollars, isn't that correct?

A. Yes.

Q. You had placed a value and reported to the insurance company the two hundred dollars?

A. Yes, sir.

Q. You feel two hundred dollars was a reasonable valuation for that coat? A. Yes.

The Court: Well, she had a three hundred [75] dollar value, a hundred and fifty dollars outside in-

(Testimony of Meryl Kirkevold.)

insurance. Do you mean she collected the outside insurance?

Mr. Velikanje: No, it was a certificate policy and which they have not paid anything. Mr. Kirkevold paid all that has been paid—made an adjustment with her and has taken an assignment.

The Court: It was over insured to the extent of a hundred and fifty dollars.

Mr. Velikanje: No, he had listed it as the valuation of two hundred dollars in the value that was placed upon the receipt when it was brought in, but she took out an additional policy, Your Honor. I might refer to this Exhibit 1 and show you where that is done. You will notice the rider, it was issued pursuant to this rider on these policies.

The Court: No, but the actual value of the property that was lost by this fire was not two hundred dollars, but three hundred and fifty dollars.

The Witness: No, I would say two hundred dollars.

Mr. Velikanje: You see, she took out—

The Court: What I am trying to get at, the liability on that item, the liability would be [76] limited according to this witness to two hundred dollars.

Mr. Velikanje: That is correct, Your Honor. I will just hand you one of these so you can see what we are speaking about on those certificates.

The Court: And the witness here—the plaintiff in this action, and the agent likewise for the Home

(Testimony of Meryl Kirkevold.)

Insurance Company, the defendant in the issuance of these certificates——

The Witness: That is right.

The Court: I see.

Q. Mrs. E. E. Leach—I do not see—I believe there is an insurance policy on her. Do you show in your proof of loss—— A. Yes, there is.

Mr. Velikanje: Mr. Hutcheson, do you have a record of the owner's policy on Leach?

Mr. Hutcheson: Two hundred and fifty, according to mine.

Mr. Velikanje: I have a policy in here some place.

The Court: Well, that would indicate fifty dollars over the two hundred.

Q. You made a cash settlement with her of two hundred and [77] fifty dollars? A. Yes.

Q. In your opinion that was the reasonable value of the coat? A. Yes.

Q. Mrs. I. B. Lisle?

A. That was valued at the time it was brought in for storage at two hundred dollars.

The Court: Two hundred?

The Witness: Yes.

Q. Do feel that was a reasonable value of that coat? A. Yes.

Q. Elsie Logozzo?

A. Well,—that was not valued at the time it was brought in for storage. No valuation was placed on it at that time.

(Testimony of Meryl Kirkevold.)

Q. However, she had a policy certificate with the company? A. Yes.

Mr. Velikanje: Mr. Hutcheson, do you have the Logozzo listed in your certificates?

Mr. Hutcheson: I don't have those certificates. According to my personal notes, it is three hundred and fifty. I do not have the certificate.

Q. What was the valuation of Mrs. Logozzo's coat?

A. Well, I have five hundred dollars. It was a new coat. [78]

Q. It was a new coat? A. Yes.

Q. The insurance company has all of those records, is that correct? A. Yes.

Q. But you do not know what the amount of her certificate was? A. No.

Q. But, you feel the reasonable value of that coat was five hundred dollars? A. Yes.

Q. Mrs. Carl Lowenthal?

A. She had an insurance policy, and we had the maximum of two hundred placed on it at the time she brought it in for storage.

Q. But, she had a certificate in the amount of two hundred and twenty-five dollars, is that correct? A. Yes.

Q. And she was paid on that basis?

A. Yes.

Mr. Velikanje: Your Honor, here is the Leach policy that was out of place. It has a valuation of two hundred and fifty dollars on it.

The Court: Yes.

(Testimony of Meryl Kirkevold.)

Q. Mrs. William F. Lyon? [79]

A. That was valued at the time it was brought in at a hundred and fifty dollars.

Q. And you feel that was a reasonable valuation?
A. Yes.

Q. Mrs. Clark Mace?

A. Yes, that was valued at a hundred and twenty-five dollars at the time it was brought in for storage.

Q. You feel that was a reasonable valuation?

A. Yes.

Q. And you made a cash settlement with her on that basis? Patricia Magee?

A. That was valued at a hundred dollars at the time of storage.

Q. Do you feel that was a reasonable valuation?

A. Yes, I do.

Q. And you made a settlement with her for a hundred dollars cash?
A. Yes.

Q. Mrs. M. J. Martinez?

A. That was valued at the time of storage at two hundred dollars.

Q. And you feel that was a reasonable valuation?
A. I do.

Q. And you made a cash settlement of two hundred dollars with her? [80]
A. Yes.

Q. Elaine McCorkindale?

A. Yes, that was valued at two hundred dollars. She had a policy.

Q. That policy was in the amount of three hundred and fifty dollars?
A. Yes.

(Testimony of Meryl Kirkevold.)

Q. And you made an allowance with her?

A. Yes.

Q. On that basis? A. Yes.

Q. G. F. McGilvery?

A. That was—it was valued at two hundred dollars at the time it was brought in.

Q. She had other insurance?

A. She had outside insurance, yes.

Q. And that insurance company has assigned their claim to you? A. Yes.

Q. But, that valuation you feel, two hundred dollars was a reasonable valuation? A. I do.

The Court: That does not seem to be in this list of—McCorkindale—

Mr. Velikanje: Your Honor please, we offer in evidence the assignment from the insurance company. [81]

Q. Mrs. J. W. Mercke. Did you have a valuation listed?

A. Yes, it had a valuation of two hundred dollars.

Q. You feel that was a reasonable valuation?

A. Yes, I do.

Q. Lucille H. Messer?

A. That was valued at the time of storage at two hundred dollars.

Q. Do you feel that was a reasonable valuation of that coat? A. I do.

Q. Bee Metzger?

A. That was not—no valuation was placed on that at the time of storage.

(Testimony of Meryl Kirkevold.)

Q. What do you feel was the reasonable valuation of that coat? A. Six hundred dollars.

Q. You feel six hundred dollars was a reasonable valuation of that coat? A. Yes.

Q. That was a coat that was in for repair, is that correct? A. Yes.

Q. Mrs. H. R. Miller?

A. That was valued at the time of storage at three hundred dollars. [82]

The Court: Let's go back to this Metzger coat a moment. You say you think the value of it was six hundred dollars?

The Witness: Yes, that was the replacement value of that coat.

The Court: Well, upon this release you settled with her, did you for a hundred and forty dollars?

The Witness: Well, then that is over valued.

Mr. Velikanje: This is the amount that you paid her in settlement is that correct?

The Witness: That is right.

Q. But, you feel the reasonable value of the coat was six hundred dollars? A. Yes, sir.

Q. But, you made a settlement of a hundred and forty? A. Yes.

Mr. Velikanje: Any further questions, Your Honor?

The Court: No. But, the proof of loss was what, in this case?

The Witness: Six hundred dollars. That was a coat that was in for repairs.

(Testimony of Meryl Kirkevold.)

Q. That was a coat that was in for repairs, was it not? A. That is right. [83]

Q. Mrs. H. R. Miller?

A. Yes, that was valued at time of storage at three hundred dollars.

Q. And you feel that was a reasonable valuation of that coat? A. Yes.

Q. Betty Mixon?

A. That was valued at storage time at seventy-five dollars.

Q. Do you feel that was a reasonable valuation? A. Yes.

Q. And that was the amount you paid her in cash? A. Yes.

Q. Louise Mixon?

A. That was valued at time of storage at a hundred dollars.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. And you paid her cash in the amount of a hundred dollars? A. Yes, I did.

Q. Mrs. J. D. Moore?

A. That was valued—we paid her a hundred and fifty dollars cash.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. There was nothing listed on the receipt?

A. That was not on the receipt. It was burned.

The Court: Wasn't this a Russian Squirrel Roller coat?

(Testimony of Meryl Kirkevold.)

The Witness: Yes, that was the cost of the Squirrel coat that we gave to her.

The Court: A hundred and fifty dollars?

The Witness: Yes, in settlement.

Q. Do you feel that was the reasonable value of that coat? A. Yes.

Q. Mr. Kirkevold, you said a hundred and fifty dollars is the cost of a squirrel coat. You refer to wholesale or retail?

A. That was the cost to us.

Q. That was the cost to you? A. Yes.

Q. In other words, your retail value would be more than that? A. Yes.

Q. That is what you listed in your proof of loss, a hundred and fifty dollars? A. Yes.

Q. And that was the settlement you made with her. Florence Morrill?

A. Yes, that was not valued when it was brought in for storage.

Q. What in your opinion was the fair and reasonable value [85] of that?

A. Three hundred and twenty-five dollars. It was a new coat.

Q. And you replaced that coat? A. Yes.

Q. And you feel that three hundred and twenty-five dollars is a reasonable value of that coat?

A. Yes.

The Court: Did you put in your proof of loss the sum of three hundred and twenty-five dollars?

The Witness: Yes.

The Court: Well, if you were limited to two

(Testimony of Meryl Kirkevold.)

hundred dollars, was there additional certificate of insurance out on this coat?

The Witness: Let's see.

Mr. Velikanje: I don't believe there would, Your Honor. This was a repair coat.

The Court: It was not a storage coat.

Mr. Velikanje: No, this was a repair coat.

Mr. Hutcheson: There was no certificate on that.

The Court: I understood it to be a storage.

Mr. Velikanje: You see, when it is brought in for repair, there is no insurance charged on it. [86]

The Court: Yes.

Q. Opal Morse?

A. That was valued at time of storage at two hundred dollars.

Q. On the receipt, what is the valuation?

A. I mean, at a hundred and fifty dollars on the receipt, and we have changed our valuation on our proof of loss to a hundred and fifty dollars.

Q. Then, it should be a hundred and fifty dollars instead of two hundred? A. Yes.

Q. On that Mrs. Opal Morse? A. Yes.

Q. You feel a hundred and fifty dollars is a reasonable valuation? A. Yes.

Q. Mrs. C. W. Munsil?

A. Yes, that was one of the receipts that were burned, I think, and we gave her allowance on her coat, which was a fair valuation of it.

Q. You feel a hundred dollars was a fair valuation on that coat?

A. Yes, that was one where the receipt was lost.

Q. You feel the receipt was issued for that?

(Testimony of Meryl Kirkevold.)

A. Yes, it was.

Q. Mrs. Elmer R. Nelson? [87]

A. That was valued at time of storage at a hundred and fifty dollars.

Q. Do you feel that was a fair and reasonable valuation? A. Yes.

Q. She only had the one coat? A. Yes.

Q. Mrs. Harry Odell?

A. That was a repair coat, and we valued the coat at six hundred dollars.

Q. However, you were able to make a cash settlement with her for two hundred dollars?

A. Yes.

Q. However, you feel that six hundred dollars was a reasonable value of the coat?

A. Yes, I do.

Q. Mrs. J. E. Orth?

A. Mrs. J. E.—that was valued at—well, there was no valuation made on that item at storage time.

Q. What do you feel was the reasonable valuation of that coat?

A. I settled with her for seventy-five dollars, which we have listed here. Yes, seventy-five dollars is what we have listed.

Q. You think seventy-five dollars is a reasonable valuation for that fur? [88] A. Yes.

Q. You list it in your proof of loss, however?

A. I have.

Q. Inez F. Palmer?

A. The valuation was placed—she had two items

(Testimony of Meryl Kirkevold.)

—two articles here, and the valuations were placed on them at time of storage Alaska Seal coat at four hundred dollars, and two collars and a Hudson Seal cape at a hundred dollars.

Q. You feel that five hundred dollars is a reasonable value? A. Yes.

Q. Was that the amount of your cash settlement to her? A. Yes.

Q. Mrs. Mose Patnode?

A. That was valued at time of storage at a hundred and thirty-five dollars.

Q. And you feel that was a reasonable valuation? A. Yes.

Q. Laura Peterson?

A. That was valued at two hundred dollars at time of storage.

Q. You feel that was a reasonable valuation?

A. I do.

Q. H. C. Pollard? [89]

A. That was valued at time of storage at a hundred dollars.

Q. Do you feel that was a reasonable valuation?

A. Yes.

Q. Merle Poulter, was valuation listed?

A. At a hundred and fifty dollars.

Q. Do you feel that is a reasonable valuation?

A. Yes.

Q. That was the cash settlement you made on that? A. Yes.

Q. Mrs. Ada Pulos?

(Testimony of Meryl Kirkevold.)

A. That was valued at a hundred dollars at time of storage.

Q. You feel that was a reasonable valuation?

A. Yes.

Q. You made a cash settlement on that basis?

A. Yes.

Q. Mrs. Rodney Ryker?

A. Well, that was valued at time of storage at two hundred dollars.

Q. You believe that was a reasonable valuation?

A. I do.

The Court: I don't have that one here.

Mr. Hutcheson: It is several points down, alphabetically.

The Court: Yes, I find it. [90]

Mr. Velikanje: That was two hundred dollars, Your Honor. I will try and bring that in line, them.

The Court: The Court feels that you should follow the Pulos.

Mr. Velikanje: You are having us follow the Pulos now? I am just taking these, but it would come between Pulos and Reich.

The Court: It does not matter.

Q. Mrs. Nan Ross—do you find that?

A. Yes, that was valued at storage time at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. Yes, I do.

Mr. Velikanje: If Your Honor can tell us where I am off.

(Testimony of Meryl Kirkevold.)

The Court: This Ross is off, also.

Mr. Velikanje: If Your Honor will tell me which is your next one.

The Court: The next one is Katie Reich.

Q. Mrs. William Reich?

A. That had no valuation at the time of storage. We placed a valuation—or the maximum valuation of two hundred dollars for the storage charges.

Q. You feel two hundred dollars was a reasonable amount? A. I do. [91]

Q. You settled with her on the basis of two hundred dollars? A. Yes.

Mr. Velikanje: What is your next one?

The Court: Irene Reischl.

Q. Irene Reischl?

A. At time of storage it was valued at two hundred dollars.

Q. You feel that was the reasonable valuation of that coat? A. Yes.

The Court: The next one is W. G. Richards.

Q. Mrs. Gordon Richards?

A. That was valued at the time of storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: The next is Mrs. Clarence Ritchie.

Q. Mrs. Clarence Ritchie?

A. That was valued at time of storage at two hundred dollars.

(Testimony of Meryl Kirkevold.)

Q. You feel that was a reasonable valuation for—

A. Yes, I do.

The Court: Then, it is Robinson, K. G.

Q. Mrs. K. G. Robinson? [92]

A. That was valued at—she had two articles. One was not destroyed, and the article that was destroyed was valued at seventy-five dollars at time of storage.

Q. The one that was destroyed was seventy-five dollars. You feel that was a reasonable value?

A. I do.

The Court: Now, the next one is Nan Ross, that he testified to.

Mr. Velikanje: We have that, and then we will follow right—we have them in order.

The Court: Then following that is Ryker.

Mr. Velikanje: Well, we have gone through that.

The Court: Following that is Mrs. G. A. Schmidt.

Q. Mrs. G. A. Schmidt?

A. That was valued at the time of storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. Yes, I do.

The Court: The next one is Rudolph Schmidt.

Q. Mrs. Rudolph Schmidt?

A. That was valued at time of storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: Schoonover.

(Testimony of Meryl Kirkevold.)

Q. Mrs. Jack Schoonover?

A. That was valued at time of storage at two hundred dollars.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: Next one is Mrs. Verda Shaw.

Q. Verda Shaw?

A. That was valued at time of storage at seventy-five dollars.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: Shirran, it looks like.

Q. Mrs. W. C. Shirran?

A. That was valued at two hundred dollars at the time of storage.

Q. You feel that was a reasonable valuation?

A. I do.

The Court: Souther.

Q. Mrs. Frank Souther?

A. That was valued—or there was no valuation placed on that at the time of storage.

Q. What in your opinion was the reasonable valuation of that coat? [94]

A. Two hundred direct replacement of that coat, was two hundred and eighty-one dollars and sixty-seven cents. That included all taxes.

Q. However, you listed in your proof of loss?

A. Two hundred and fifty dollars.

Q. You replaced that coat? A. Yes.

The Court: Spinner.

Q. Mrs. H. R. Spinner?

(Testimony of Meryl Kirkevold.)

A. That was valued at two hundred dollars at the time of storage.

Q. And you feel that was a reasonable valuation of that coat? A. Yes.

Q. Gladys Stanley?

The Court: No, Dorthea Stanley—Mrs. F. D. Stanley, Dorthea.

Q. Dorthea Stanley?

A. We had placed on the certificate two hundred dollars for two articles that—which was the maximum, but she had a policy which I think was eight hundred dollars or something.

Q. Your receipt shows an insurance of eight hundred dollars?

A. Yes, that was one of the certificate policies with the company. [95]

Q. And paid a premium on that on the basis of eight hundred dollars? A. Yes.

Mr. Hutcheson: You stated a moment ago you placed on the certificate two hundred. You meant, on the receipt, didn't you?

The Witness: I mean on the receipt, yes, that is right.

Q. You also show a valuation of eight hundred dollars on the receipt, too? A. Yes.

Mr. Hutcheson: You say on the receipt?

Mr. Velikanje: Yes, there is a value of eight hundred dollars on the receipt.

Mr. Hutcheson: Well, the receipt speaks for itself.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: Your Honor care to see this one while we are referring to it?

The Court: Well, what I want to get clear is that—did you pay the eight hundred dollars to this woman?

The Witness: Yes, cash settlement of eight hundred dollars.

The Court: And you took an assignment of her rights under this insurance? [96]

Mr. Velikanje: Now, which one next?

The Court: The next one is Gladys.

Q. Gladys Stanley?

A. That was valued at time of storage at a hundred and fifty dollars.

Q. And you feel that was a reasonable value?

A. Yes.

Q. And you paid her one hundred?

A. A hundred and fifty dollars, yes, sir.

The Court: Next one is Mrs. Stoltenow.

Q. Mrs. B. W. Stoltenow?

A. That was valued at time of storage at a hundred dollars.

Q. You feel that was a reasonable valuation?

A. I do.

Q. And you made a cash settlement of one hundred dollars. Agnes M. Stuart?

A. That was a repair coat, and skins. She had a set of skins and the valuation would be three hundred and fifty dollars.

Q. That was repair—she did not pay any insurance? A. No.

(Testimony of Meryl Kirkevold.)

Q. But, you listed it in your monthly report on that basis?

The Court: Three hundred and fifty dollars?

The Witness: Three hundred and fifty dollars.

Q. You feel that is a reasonable valuation of those articles? A. I do.

Q. John H. Stumpf?

A. That was valued at two hundred and fifty dollars at time of storage.

Q. You feel that was a reasonable valuation?

A. I do.

Q. They had paid an additional premium for that? A. Yes.

Mr. Velikanje: Maybe we are mixed up on these again.

The Court: Thelma Taliaferro.

A. That was valued at a hundred dollars at time of storage.

Q. Do you feel that was a reasonable valuation?

A. I do.

Q. I note in your receipts you gave her a hundred and twenty-nine dollars and seventeen cents allowance.

A. Well, I guess on that I gave her that allowance.

Q. But you feel the reasonable value was——

A. A hundred dollars.

The Court: Thacker.

Q. Mrs. Cecil Thacker?

A. That was valued at two hundred dollars at time of [98] storage.

(Testimony of Meryl Kirkevold.)

Q. You feel that was a reasonable value?

A. Yes, sir.

Q. Did you settle with her for eighty-six dollars?

The Witness: No, no, she got a new coat. It was a new coat.

Q. These figures should not be in there should they? A. No.

Q. They do not have any bearing on this matter—I don't suppose they should be on these others?

The Court: This release shows in consideration that eight dollars and four cents——

Mr. Velikanje: Here is the original release. Mr. Hutcheson, did you see the originals? I think that is a mistake.

Q. Do you know what you did with that in settlement?

A. Well, they got the new coat, and we allowed her——

Q. Do you know what those figures mean?

A. No.

Q. Then, that eighty-six dollars and four cents does not bear upon that?

A. I don't think so.

Mr. Velikanje: If your Honor please, we can separate this.

The Court: I think you had better, because it [99] will be questioned.

Mr. Velikanje: Well, it is already in as an Exhibit. Mr. Hutcheson has approved these, but he has approved them on the basis of my submitting those to him.

(Testimony of Meryl Kirkevold.)

Mr. Hutcheson: What do you mean by "approved"? I haven't approved anything.

The Court: Well, you admitted the validity of all of the receipts, but I believe you can bring it out in the evidence.

Q. Now, Mr. Kirkevold, your settlement with Mrs. Thacker, you did not pay her eighty-six dollars and four cents?

A. No, she got a new coat.

Q. Based on the value of two hundred dollars?

A. Yes.

Q. And that eighty-six dollars and four cents should not be on this at all? A. No.

Q. It has no bearing on the settlement?

A. No.

Q. Mrs. David G. Thomas?

A. That was valued at the time of storage. Oh yes, she had two articles. One was not destroyed, and the coat that was destroyed was valued at a hundred dollars.

Q. Do you feel that was the reasonable value of that coat? [100] A. Yes.

Q. Elsie Steele Thomas?

A. That was one of the articles where the receipts were burned, so we haven't that, so the valuation was placed on it at two hundred dollars. That would be the maximum valuation for that—for the storage charges.

Q. Do you feel that was a reasonable value of that coat? A. Well, that was, yes.

(Testimony of Meryl Kirkevold.)

Q. And you made a cash settlement with her for two hundred dollars? A. Yes.

Q. Mrs. J. C. Thompson?

A. That was a valuation of two hundred dollars placed on the garment at the time of storage.

Q. You feel that was a reasonable valuation of it? A. Yes.

Q. Mrs. Rex Tilton?

A. That was just in for repairs and no valuation on the certificate or receipt, but we originally put in a hundred and seventy dollars and settled for seventy-five, so we reduced that to seventy-five dollars.

Q. Seventy-five dollars, but you feel the reasonable value of that was one hundred and seventy dollars? A. That is right.

Q. But, you were able to settle for seventy-five? [101] A. That is right.

Q. Mrs. Glen D. Timpke?

A. That was valued at two hundred dollars at time of storage.

Q. You feel that was a reasonable value?

A. I do.

Q. You made a settlement with her for two hundred dollars? A. Yes.

Q. Mrs. Charles Verd?

A. That was a receipt that was burned, and that was a new muskrat coat, and we have valuation of three hundred and fifty dollars.

Q. And you replaced that coat? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. They had already paid for the coat that you—— A. Yes.

Q. And you made a settlement with them on the basis of three hundred and fifty dollars?

A. Yes.

Mr. Hutcheson: Pardon me, was there any receipt as to——

Mr. Velikanje: No, there is a tag ends of them here. It is just the corners with the name is all that is left of all of the receipts.

The Court: Your proof of loss was made on the basis of three hundred and fifty dollars?

The Witness: Yes.

Q. Mrs. James Vivian?

A. That was a repair coat, no valuation was placed on the receipt.

Q. What do you feel was the reasonable and fair valuation of that coat?

A. One hundred and fifty dollars.

Q. Is that the amount you put in your proof of loss? A. Yes.

Q. Mrs. Carlyle Wait?

A. There was no valuation placed on that ticket or receipt at time of taking it in, and we settled for two hundred and twenty-five dollars.

Q. You feel that two hundred and twenty-five dollars is a reasonable and fair value of that coat?

A. Yes.

Q. That is the amount you list in your proof of loss? A. Yes.

Q. Mrs. C. J. Walsh?

(Testimony of Meryl Kirkevold.)

A. That was a valuation of two hundred dollars placed on the garment at time of storage.

Q. And you feel that was a reasonable value?

A. Yes, I do.

Q. You made a cash settlement on that basis?

Mrs. Harold Warner——

Mr. Velikanje: Oh, let me get these in order.

Q. (Continuing): Mrs. A. K. Warner?

A. There was a valuation of two hundred and fifty dollars placed on that coat at time of storage.

Q. They paid additional storage. You feel that is the reasonable value? A. Yes.

Q. And that is the amount you settled for?

The Court: Mrs. Harold Warner, you made no claim for loss there.

Mr. Velikanje: Mrs. Harold Warner?

The Witness: I think that is——

Mr. Hutcheson: I believe you told me you were not making any claim for her.

The Witness: Yes.

Mr. Velikanje: That is right, it says “No damage to coat” here on the release.

Q. Mrs. Wright Wiehl?

A. There was a valuation of two hundred dollars placed on this garment at time of storage.

Q. Do you feel that was a reasonable valuation?

A. I do.

Q. Mrs. D. A. Williams? [104]

A. There was a valuation of a hundred and fifty dollars placed on this coat at time of storage.

Q. You feel that was a reasonable valuation?

(Testimony of Meryl Kirkevold.)

A. Yes.

Q. Mrs. Ed. Willson?

A. And that was—there was a valuation of two hundred dollars placed on that coat at time of storage?

Q. And you feel that was a reasonable valuation?
A. Yes.

Q. Mrs. Delbert Wright.

A. The valuation of a hundred and fifty placed on the receipt.

Q. She had two coats listed, has she not?

A. Oh yes, one was listed at a hundred and fifty. That coat was not destroyed. The coat listed at a hundred dollars was destroyed.

Q. You feel that was the reasonable value, and that is what you settled at?
A. Yes.

Q. Mrs. Paul F. York?
A. Yes.

The Court: Well, did you have those in evidence? That seems to conclude this list that you had.

Mr. Velikanje: There are two more listed [105] on the proof of loss. Mrs. Paul F. York, she had a policy?

The Witness: Yes, I am pretty sure she had a policy.

Mr. Hutcheson: She did not have any certificate.

The Witness: Oh, that was on—that is right.

Q. The valuation is listed?

A. Three fifty, yes.

Q. Three fifty. Do you feel that is a reasonable valuation?
A. Yes.

(Testimony of Meryl Kirkevold.)

Q. And that is what you made settlement upon?

A. Yes.

The Court: Were those in evidence as part—

Mr. Velikanje: Yes, they are.

Q. Now, there is one more listed on there.

A. Irene Bryon.

Mr. Velikanje: I will have to look that up, your Honor. There is another release here. However, Mrs. Bryon had a certificate policy, and made proof of claim, but I will have to look for our assignment on that. I am sure we have one.

Q. Now, Mr. Kirkevold, all of those coats that you have [106] listed here were destroyed?

A. Yes, sir.

Q. Or so seriously damaged there was no salvage value from them? A. Yes, sir.

Q. At the time that Mr. McKinley, the insurance adjuster looked at all of those coats, he advised you that the insurance company desired no salvage from them? A. Yes, sir.

Q. So far as he was concerned, it was a complete loss, is that correct? A. Yes.

Q. Now, Mr. Kirkevold, where were these coats at the time they were destroyed?

A. At the time when the coats were destroyed, was in our working quarters, and also a room where we had coats hanging ready to be worked on.

Q. Could you draw—

Mr. Velikanje: Mr. Hutcheson, would you have any objection, if we used this diagram?

Mr. Hutcheson: No.

(Testimony of Meryl Kirkevold.)

Q. All of these coats were at the Barnes-Woodin at 301 East Yakima Avenue, were they not? A. Yes. [107]

Mr. Velikanje: I am going to have to make some changes, because this is not a correct drawing. He will have to make some changes on it.

You might as well put it up there.

The Court: I think before we go into that, we will take a recess for ten minutes.

(Recess.)

Q. Mr. Kirkevold, I wish you would show on identification 5 where those coats were stored. Perhaps, if you take a red pencil, would you mark with red pencil where the coats that were destroyed were at the time?

A. Well, there was a rack of coats hanging along this partition here (indicating).

Q. Mark that "A".

A. And this doorway is over to this corner a little too far. The door should be a little more over this way (indicating).

Q. More to the south?

A. Yes, because we had a small rack over here with just a few more coats, and then we had one long rack back in this room (indicating).

Mr. Velikanje: Mark that "B".

A. (Continuing): And several small racks in here (indicating), say three or four—I am not certain now. [108]

Q. Now, the coats that were destroyed were at the places marked "A" and "B"—those were customers' coats? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. In this diagram I wish you would explain to the Court what the different spaces were used for, or just explain this exhibit or this identification 5.

A. Well, this was our sales room (indicating).

Q. Just mark that sales room, Mr.—

A. Sales room with bins or new coats hung in these bins around the sales room, and this was a work room (indicating) along these windows, all along the side of this wall and down to here (indicating), and there was a work room in here (indicating). We had a work table in this space right in here (indicating).

Q. And what was the rest of the space used for?

A. Oh, here is—there was a catwalk along here, with a partition. There is a partition. The balcony edge is right—

Mr. Velikanje: Mark that partition “B”.

Q. Now, was that partition way up to the ceiling? A. Way up to the ceiling, yes.

Q. And the space to the north “B” and back to what you call a work table? A. Yes.

Q. What was that used for? [109]

A. This space right in here, what I have got—

Q. No, the space back—

A. Oh, this was a storage room where we hung our coats as they came in.

Q. Now—

Mr. Hutcheson: Of course, the Court understands that we are objecting to that as the conclusion of the witness. That is a question for the Court to decide, whether that was a storage room

(Testimony of Meryl Kirkevold.)

or not. I think he should state what they did in that space and leave the Court to decide the question.

The Court: Yes, proceed. You will have an opportunity to cross examine, Mr. Hutcheson.

Q. Now, you referred—mark that store room, that which you referred to as store room.

Mr. Hutcheson: We objected to that. That is a question for the Court to decide. What that room is.

Mr. Velikanje: You will have your opportunity, I believe.

The Court: Yes, proceed.

Q. Now, referring to what you have marked there as store room, what coats were stored in that room? A. All customers' coats.

Q. Did you have another storage room? [110]

The Court: Go ahead.

Q. Did you have another storage room?

A. Yes, we had a storage room on the floor above.

Q. What was the storage room upstairs used for?

A. That was our permanent—well, permanent storage room, after all of the work had been done on the coats, if there was any work to be done.

Mr. Velikanje: Sit down there.

Q. Now, Mr. Kirkevold, I wish you would just explain to me what happened when a coat came into your place for repairs.

(Testimony of Meryl Kirkevold.)

A. The coat was taken in, in the sales room and ticketed.

Q. Is that where your receipt was issued?

A. Yes, sir, in the sales room, and the coat was brought back and hung in our storage room on that floor in the back, until we—such time as we were able to get to work on it, or whatever had to be done.

Q. And then a coat that was brought in for repairs, after the repairs were completed, where was that coat taken?

A. After all of the repairs?

Q. The repairs were done.

A. Then it was taken upstairs. [111]

Q. Even though it was not there for storage?

A. No, the room upstairs was reserved for storage—paid storage.

Q. For paid storage. What would happen to a coat that was in for repairs that the customer was going to come and get a week or two weeks after your repairs were done?

A. Oh, that would hang in the storage room downstairs.

Q. That would be put back in that storage room?

A. Yes.

Q. Now, you say when you had a customer's coat come in for storage, what would be done?

A. That would go through the same process. It would be ticketed in the sales room and brought back to this storage room until such time as we could—every coat that came in was checked over before it was put upstairs.

(Testimony of Meryl Kirkevold.)

Q. Then, after your coat was received in the sales room you say it was taken back to what you have marked the store room? A. Yes.

Q. And how long would it be left there?

A. Some times it would be left there a month, or maybe a little longer.

Q. Before your force could get to it? [112]

A. Yes.

Q. Was there any work of any kind being done in this store room? A. No.

Q. Was it used exclusively for storage?

A. Yes.

Q. Back—at the back part of the store room were there some shelves?

A. Yes, some shelves with boxes in them that had fur pieces in them.

Q. Those were not customers' fur pieces?

A. No.

Q. Those were your own?

A. Yes, sir, that was our storage room for them.

Q. After a storage coat came into the store and put in this store room you say for a month or more?

A. Yes, sir.

Q. Then where was it put?

A. Then, as the date—we tried to get our coats out according to date—we would come in and get the coat and take it out and do the work on it.

Q. That would go into this part marked "A"?

A. Yes.

Q. And after the work was completed, then what?

(Testimony of Meryl Kirkevold.)

A. Then it would go upstairs to the next floor.

Q. If your coat was in there for cleaning, as well, where would it be taken?

A. It would be taken back to the same room, and then taken out and taken up—our cleaning room was on another floor, and cleaned.

Q. This was on the mezzanine, was it not, of the Barnes-Woodin Company? What you call the cash paying or permanent store room, was on the second floor? A. Yes.

Q. Now, let's see if I follow that, if a coat was in for cleaning and for storage it would first go through the work room and would be checked over, is that correct? A. Yes.

Q. What would they do in the work room?

A. Well, if it had rips, they would repair it and sew it up, or if it was to be re-styled, that was done there. For relining, that was done there.

Q. How about—did you demoth their coats?

A. Yes.

Q. Where was that done?

A. On the second floor.

Q. In your cleaning department? A. Yes.

Q. Mr. Kirkevold, I did not ask you before. What is your experience with furs? [114]

A. Well, I have been in the fur business—it is the only work I have done. I have been in it since 1926, which makes it 40 years, this year, I mean, 20 years, this year.

Q. How old are you?

A. 35. I will be 36.

(Testimony of Meryl Kirkevold.)

Q. You have been in the fur business since 1926? A. Yes.

Q. Have you been exclusively in the fur business all of the time?

A. Yes, up until—oh, a few months in '43 and '44. I had some—I was on a ranch.

Q. But, you still had your fur business, too?

A. Yes.

Q. You started in 1928? A. Yes.

Q. Were you still in high school?

A. Yes, the last two years in high school.

Q. But—have you been in your own fur business? A. In the fur business since then.

Q. You feel you know furs pretty well?

A. Yes, I do.

Q. Now, these valuations that you placed on these furs before, are based upon your knowledge of furs over a period of twenty years? [115]

A. Yes.

Q. Mr. Kirkevold, what percentage of customers' furs that were destroyed in this fire were in the work room on these racks marked "A", and what per cent were in the back part that you have marked store room?

A. Well, I would say that in the store room there were seventy-five to eighty per cent.

Q. Of the coats?

A. Of the coats that were destroyed in the fire were there.

Q. After the mess of the fire, it was impossible to tell what coats were where, is that correct?

(Testimony of Meryl Kirkevold.)

A. Yes.

Q. But, would that be about your percentage?

A. Yes.

Q. Were you at the peak of your season at that time?

A. No, it was early, just starting in the storage season.

Q. But your coats were coming in quite rapidly, at that time?

A. The weather had broken just previously to that. I mean, the weather had gotten warm enough so that customers started bringing their coats in at that time. [116]

Q. Those coats were in that storage space?

A. Yes.

Q. When storage coats came in, were they ever put directly into the upstairs storage?

A. No.

Q. Why not?

A. We advertised that—in our advertising that we checked over the coat. It goes through several little steps that we have, and each coat has to be examined.

Q. Also do you demoth it before it is put in?

A. Sometimes. We never put a coat in our permanent storage with moths in it.

Q. You had a practice then of never putting coats directly into the upstairs storage?

A. That is right.

Q. Did they always go through this process that you have referred to here?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Mr. Kirkevold, I hand you Plaintiff's identification 6. What is that?

A. Well, that is what we call our six-point program for storage. It is the process that the coat goes through, and what is taking place with the coat.

Q. Was this process—or this circular out at the time [117] of the fire?

A. Yes, we have had that since early '43.

Q. Did you represent to your customers that their coats were all insured? A. Yes.

Q. Was this same program published over the radio? A. Yes, it was.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: That is objected to, if the Court please, as immaterial, irrelevant and incompetent—purely a self-serving declaration of the plaintiff himself and has probative value, whatever.

Mr. Velikanje: This Exhibit 6, was that circulated among the employees of the Barnes-Woodin Company?

The Witness: Yes, sir.

Q. Did you have—also have similar circulars put out in public?

A. We had stuffers that were put in the envelope with the statement.

Q. Similar to this? A. Yes.

Q. And you were doing that at the time of the fire, or previous to that? [118] A. Yes.

The Court: The objection will be overruled and it will be admitted in evidence.

(Testimony of Meryl Kirkevold.)

(Whereupon, copy of six-point program referred to was then received in evidence and marked Plaintiff's Exhibit #6.)

Q. In hand you plaintiff's identification 7. What is this?

A. This is advertising copy of the local newspaper.

Q. Did you consistently advertise in the paper?

A. Yes.

Q. Similar to this? A. Yes.

Q. This is dated June 9th, 1944. It would be just one month after your fire, is that correct?

A. Yes.

Q. But, had you been doing similar advertising to this?

A. The old advertising records were not kept when the new company took over the Barnes-Woodin Company.

Mr. Hutcheson: That is objected to as incompetent, irrelevant and immaterial, and purely a self-serving declaration, not binding on the defendant in any way.

The Court: The same class, I presume. Does it have anything in there with reference to insurance? [119]

Mr. Velikanje: It has, your Honor.

The Court: Objection will be overruled, and it will be admitted in evidence.

(Whereupon, advertising copy referred to was then received in evidence and marked Plaintiff's Exhibit #7.)

(Testimony of Meryl Kirkevold.)

Q. Mr. Kirkevold, were there customers' coats anywhere in the Barnes-Woodin Company except in the upstairs store room, in the cleaning—you can hardly call it a room, your cleaning establishment, wasn't it out on a landing?

A. Yes, it was on a landing.

Q. But, you call that the cleaning room, and then there were these in the repair department or your service department, and these in the downstairs store room? A. Yes.

Q. Were there coats in any other place, or could there have been coats in any other place?

A. Well, there could have been coats in the receiving room.

Q. Where is that?

A. Well, that is in the basement, on the basement floor.

Q. And what is the receiving room used for?

A. Well, that is receiving all merchandise coming into the store. [120]

Q. Where is your merchandise handled—that is, going out of the store——

A. And that is also where it is taken when it leaves the store.

Q. Let us state, as an example, that a customer called and wanted her coat sent out to her. Where would that coat be sent?

A. We would wrap it and send it—take it down to what we call the receiving room, where a messenger would pick it up and deliver it to her.

Q. Then, outside of the two storage rooms, you

(Testimony of Meryl Kirkevold.)

had your cleaning room and your repair room and the receiving room? A. Yes.

Mr. Hutcheson: Of course, I object to that as leading and suggestive, for counsel himself to call this a store room.

The Court: I think it is.

Mr. Velikanje: That is correct.

Q. : From whom did you receive your customer policy—the policy that is in question?

A. From Hargraves and Orkney.

Q. Did they handle off your insurance at that time? A. Yes, they did.

Q. Who was the person in that office that you dealt with? [121]

A. His name is James Orkney.

Q. James Orkney? A. Yes.

Q. I hand you plaintiff's identification 8. What is that?

A. That is a record of insurance.

Q. Where did you secure that record from?

A. From Hargraves and Orkney.

Q. Do you know whose writing that is in?

A. No. I can't say. It was given to me by—

Q. Was it filled in at at the time it was given to you?

A. Yes, it was filled in at the time it was given to me.

Q. It was given to you by James Orkney?

A. James Orkney, yes.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: That is objected to as incom-

(Testimony of Meryl Kirkevold.)

petent, irrelevant and immaterial. It does not refer to a Home Insurance Policy at all. It refers to several policies in other companies, and no showing——

Mr. Velikanje: That is the number of this policy.

Mr. Hutcheson: I see I am in error, it does refer there to the Home Insurance Company, but is wholly immaterial so far as proving any issue in this case is concerned, or showing anything within the authority of an agent of the insurance company.

Mr. Velikanje: The second from the last one, [122] there, Your Honor, is the policy that is in question.

Mr. Hutcheson: Since the issuance of the policy is not in dispute, I don't think that proves anything.

The Court: Objection will be overruled.

(Whereupon, record of insurance referred to was then received in evidence and marked Plaintiff's Exhibit No. 8.)

Q. Did you go over your policies with Mr. Orkney? A. Yes.

Q. Did he ever advise you as to the limits of Exhibit 1?

Mr. Hutcheson: That is objected to, if the Court please. The policy speaks for itself, a mere conversation with the agent does not change the limits of the insurance company's policy.

(Testimony of Meryl Kirkevold.)

The Court: I think that is true. I think I will sustain the objection.

Mr. Velikanje: Take an exception, Your Honor.

The Court: I do not mean to limit you to the point, if they discussed the identical matter here—that is, the agent that wrote the policy, but—

Q. Did the agent ever advise you what was covered in your [123] policy? A. No.

Mr. Hutcheson: Make the same objection.

The Court: Did the agent ever discuss with you these limits of liability?

The Witness: No.

The Court: Or, did you ever discuss with him anything in that connection?

The Witness: No.

Q. Did you make your reports to Mr. Orkney?

A. To his office, yes.

Q. To his office, and were those reports based upon the amounts as listed in—as you have testified to this morning on your proof of loss?

A. Yes.

Q. Or, this afternoon.

Mr. Hutcheson: Well, that is objected to, and move to strike the answer as entirely too broad and uncertain, indefinite, and also it is not the best evidence.

The Court: No use of arguing that phase of it, Mr. Hutcheson. The case is being tried to the Court without a jury. If it is irrelevant, I will so regard it, though right at this point, in this policy which is Plaintiff's Exhibit 1, and the [124] rider

(Testimony of Meryl Kirkevold.)

on it—the last one, appear to have a date subsequent to the fire.

Mr. Velikanje: That is correct, that is what we discussed this afternoon when it was admitted that was a rider that was put there subsequent to the fire.

Mr. Hutcheson: It is agreed that has no bearing on it.

The Court: Now, you may proceed.

Q. You testified, did you not, that you had no conversations as to the limits of this policy?

A. That is right.

Q. With Mr. Orkney or with anyone of the Home Insurance Company?

The Court: Was Mr. Orkney familiar with your place of business and your arrangement in it?

The Witness: Yes, he is.

The Court: And was before the fire?

The Witness: Yes.

The Court: Is your arrangement the same now as it was before the fire?

The Witness: No, the store has been completely remodeled.

The Court: And the reports, you say you made to him, were reports showing the amount of [125] merchandise you had in your storage from time to time?

The Witness: Yes, customers' goods.

The Court: How often would you make them?

The Witness: That was *to* made at the end of each month, a 30-day grace.

(Testimony of Meryl Kirkevold.)

The Court: Then, your premiums were based upon those reports?

The Witness: Yes.

The Court: That is all. I wanted to clear that up.

Q. Mr. Kirkevold, in your reports to the insurance company, was any segregation made of coats that were in "A" or in the part marked "store room," or upstairs? A. No.

Q. Were they all listed in one lump sum?

A. Total valuation.

Q. Total valuation? A. Yes.

Q. You were not asked to segregate?

A. No.

Q. Did you pay any additional premium on coats in the repair shop, or in the downstairs store room, or upstairs store room?

A. No, the rate was the same.

Q. You paid one premium on a lump sum, each month? [126] A. Yes.

Q. Was Mr. Orkney at your place of business prior to the fire?

A. Had he been there?

Q. Yes. A. Oh yes, he dropped in often.

Q. Had he gone through all of your store rooms?

A. Yes.

Q. Did the company or Mr. Orkney ever ask to see your receipts? A. What do you mean?

Q. The receipts issued to customers, or copies of them? A. Yes.

Q. Did you show them to him?

(Testimony of Meryl Kirkevold.)

A. He has seen them, yes.

Q. Mr. Kirkevold, were you short of help at this time? A. Yes.

Q. Had your brother previously been in business with you? A. Yes.

Q. Where was he at the time?

A. At the time, he had left to join the armed forces.

Q. And your coats backed up a bit on you at that time? A. They had.

Q. Were you having trouble getting additional help? A. Yes, we did. [127]

Q. Referring to your upstairs store room, was that a fire proof room? A. No.

Q. What were the walls made out of?

A. Plaster.

Q. And just outside of the wall, is that where you had your cleaning mechanism? A. Yes.

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. Mr. Kirkevold, referring first, to some of these customers' coats that you referred to here, in the case of Hattie Baur, you settled with her I believe for fifty dollars cash, did you?

A. Yes.

Q. And with reference to any particular fur garment, you are not claiming now against the defendant any more than you paid in any particular instance, are you, on your settlement with the customer? A. I did not get that.

(Testimony of Meryl Kirkevold.)

Q. I say, as to any particular fur garment, you are not claiming now against the insurance company any more than you actually paid to the customer, are you? [128] A. No.

Q. In other words, you paid her fifty dollars, and you are claiming fifty dollars against the company? A. Yes.

Q. Now, you used the expression, assuming the customer, of whom there were a number, who had a valuation stated on the receipt of two hundred and fifty dollars, we will say—some amount above two hundred dollars? A. Yes.

Q. And assuming that no certificate was issued to that customer, you used the expression that they paid an additional premium. Was any additional premium received by the Home Insurance Company as to those where no certificates were issued?

A. Well, the reports are based on the valuation, so if the customer values her coat at anything over two hundred dollars, that is reported to the company and they charge us with an additional charge.

Q. And how did that compare with the amount, was that the same, or a different amount as was paid to you by the customer?

A. On the company's charge?

Q. Yes.

A. The company's charge was not what the customer paid.

Q. In other words, they were on a different basis, entirely? [129] A. Yes.

Q. So that there was an additional considera-

(Testimony of Meryl Kirkevold.)

tion that you received if the customer got more than a valuation of two hundred dollars?

A. Yes.

Q. And when you stated that the customer paid an additional premium, you did not mean they paid additional premium that went in as such, the same amount, to the insurance company, did you?

A. No.

Q. In other words, that was the payment to you?

A. Yes.

Q. The amounts that were reported by you on your monthly report to the insurance company, were they the same as the amounts—that is, were they the total of the amounts stated on the receipts, or how did you arrive at that?

A. Yes, I would go through at the end of the month and total valuations on the receipts, and where valuations were not listed, I would put a valuation on that for the type of coat it was.

Q. In the cases where no valuation was stated on the receipt, how did you determine the amount that you reported? You just used your own judgment?

A. Just through my knowledge, yes, of fur.

Q. You did not make a practice of reporting two hundred dollars, did you? In other words, it varied? A. Yes.

Q. In such cases, where a certificate was issued, I believed there was thirteen certificates here—that is approximately correct, isn't it?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Where a certificate was issued for one amount and a receipt was issued to the same customer of the same coat for a different amount, which amount did you report to the insurance company?

A. I reported the two hundred dollars—or I mean, the amount that was on the receipt.

Q. The amount on the receipt. Did you say that Mr. Orkney examined these receipts prior to the fire?

A. Yes, he has seen them—well, ever since I have been in business over here.

Q. Well, when was the last time that Mr. Orkney, to your knowledge, examined these receipts before the fire?

A. Oh, it could have been three or four months before, at one time.

Q. As a matter of fact, practically all of the fur coats involved in the fire were received by you later than that, weren't they—that is, more recently prior [131] to the fire than three or four months?

A. Yes, they probably were.

Q. Referring to a few of these coats, I want to ask you about—referring to that of May Bobst, isn't it a fact that her coat was upstairs in the storage room on the second floor, and was not damaged? A. No.

Q. Did you tell Mr. McKinley that?

A. No, not that I know of.

Q. Are you sure that it was destroyed in the fire? A. Yes, it was.

(Testimony of Meryl Kirkevold.)

Q. As to the half a dozen or so of these receipts that are missing, do you know what became of them?

A. They were no doubt burned up. There was a lot of them burned.

Q. In those instances, when you settled with the customer didn't you obtain their original receipts?

A. We had them sign a release, and often times as it is now, a customer will misplace a receipt and we have them sign a release to the effect that they received their coat.

Q. Do you have any record other than the receipts themselves, as to the values stated on the receipts? In other words, did you keep a record in any other book, or anything of that kind? [132]

A. No, that was kept in a file and worked from those receipts, our copy.

Q. Did you keep any records of those values other than the receipts themselves?

A. No, that was our valuation record, as far as I remember. Yes, it was.

Q. It was your only valuation record?

A. Yes.

Q. It was not just clear to me, your testimony as to the Carmen matter. If you wish to refresh your recollection, I have no objection, but that receipt is missing at the present time, I believe.

A. What was the name?

Q. Carman, C-a-r-m-a-n.

(Testimony of Meryl Kirkevold.)

A. Yes, that was one of the receipts that I think was burnt.

Q. And do you know what value was placed on the Carman receipt?

A. A hundred and fifty dollars.

Q. And what would be your opinion as to the fair value of that garment at the time of the fire?

A. That was what I considered a fair value.

Q. That is what I am asking you, what would you say?

A. I would say that was a fair value.

Q. How do you come to that amount stated on that receipt? [133] Do you have any way of refreshing your recollection, at all?

A. Well, in that particular case she was a storage customer for two seasons, I think, prior to that had been in several times. Anyway with her coat, I just happen to know her coat.

Q. And you remember that amount, do you?

A. Yes.

Q. You stated that there were three coats that Mrs. Dawson had, and that one of them was not damaged in any way. Where was it, was it in the storage room on the second floor?

A. That was taken to the second floor.

Q. Prior to the fire? A. Yes.

Q. By the way, did you do anything to the coats outside of this workroom on the mezzanine floor, other than demoting them upstairs, I think you stated, that you did the demoting on the second floor?

(Testimony of Meryl Kirkevold.)

A. Well, they are cleaned. The ones that come in for demoting are demoted on the second floor, and—I mean, that is where it is done, but—

Q. Do you do or did you at that time, do anything else on the second floor, aside from storage other than demoting? [134] A. Cleaning.

Q. You did cleaning up there, also?

A. Yes.

Q. How large a space was used for that purpose, cleaning and demoting?

A. Oh, it was a sort of a ledge that was probably four feet wide and—oh, ten feet long,—something like that, eight or ten feet long.

Q. Was it at a landing, did I understand?

A. Yes, on a landing on the second floor.

Q. Was it near this storage room on the second floor? A. Yes.

Q. And about how many coats, as a rule, were kept there at that— A. In the cleaning?

Q. Yes.

A. Well, very few, maybe two or six at a time—something like that.

Q. Just a very small number? A. Yes.

Q. Did you do any cleaning or demoting in this work room on the mezzanine floor?

A. No.

Q. With reference to the issuance of these certificates you of course were not a licensed insurance agent, [135] licensed by the state, were you? A. No.

Q. In other words, you were authorized by the

(Testimony of Meryl Kirkevold.)

Home Insurance Company to issue these certificates, based on the system provided in the main policy here, is that right? A. Yes.

Q. And how did it happen that in a number of instances you issued certificates and issued receipts on the same coat for different amounts?

A. Well, for instance, a customer would bring her coat in and she had the policy probably previous to the time of bringing her coat in, and so maybe not a regular girl would wait on her that was versed in that, that had a record probably of her policy, and one of the girls in the shop, or whoever it was, might have taken her coat in and just written it down like that.

Q. That is, just one of those mistakes in the office that happens? A. Yes.

Q. You never reported to the Home Insurance Company, did you, that certificates and receipts had been issued for different amounts on the same garments? A. No.

Q. And you never mentioned that to Mr. Orkney, had you? [136] A. No.

Q. Referring to the Erickson coat, the amount that you paid to the other insurance company—I think the General Insurance Company on that, was two hundred dollars wasn't it?

A. I am not sure about that.

Mr. Velikanje: I believe that is correct, Mr. Hutcheson, that is the one he made a settlement for two hundred dollars.

The Witness: That is right.

(Testimony of Meryl Kirkevold.)

Q. How much did you actually pay to Hazel Fiebelkom? The release, I might say, says valuable consideration without stating the amount?

A. Well, she is a girl that works in the shop.

Q. She was an employee of yours?

A. Yes, and we reimbursed her with a coat of equal value.

Q. The value I believe you said, was twenty-five dollars? A. Yes.

Q. Had she paid any charge at all prior to the fire? A. You mean, storage charge?

Q. Storage charge.

A. We just charged them what it cost to store it, is all—I mean, like so much a hundred. Of course, she did not have a hundred dollars. In a case like that, [137] where her valuation was low, we would not charge her.

Q. So, she did not pay any charge?

A. No.

Q. Your testimony was not clear to me as to Mrs. Del. Fleming. Did she had two coats that were destroyed? A. Yes.

Q. And what were the amounts stated on the receipts as to those?

A. I am not sure, but three and one hundred—or what was it, four hundred?

Mr. Velikanje: Just a moment, two hundred and one hundred.

Q. Both of those were destroyed, were they?

A. Yes, sir.

Q. And what was your testimony as to the fair,

(Testimony of Meryl Kirkevold.)

reasonable value of each of those at the time of the fire?

A. That was a fair valuation. As a matter of fact, it was under valued.

Q. Referring to Mrs. Fortier, if I understood you correctly you testified three hundred dollars, but your proof of loss as to hers in the amount you are claiming is two hundred dollars. Am I not correct about that?

Mr. Velikanje: That was a certificate, was it not?

Mr. Hutcheson: It was a certificate for [138] two hundred and twenty-five dollars, according to my——

Mr. Velikanje: Yes, that is what I have here.

Q. What amount was actually paid to Mrs. Fortier?

Mr. Velikanje: The receipt shows cash two hundred and twenty-five.

Mr. Hutcheson: Is that correct, cash of two hundred and twenty-five dollars?

The Witness: Yes.

Q. And if I understood you to testify that you are claiming three hundred, while you are claiming two hundred and twenty-five dollars on that one.

Mr. Velikanje: That is correct.

Q. And as I understand Gertrude Gannon's coat was not damaged in the fire. It was not there at the time of the fire?

A. Yes, it was.

Q. It was there?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. What is the value of the Gertrude Gannon coat?

A. I am not sure, a hundred and——

The Court: The witness testified a hundred and fifty dollars.

The Witness: A hundred and fifty dollars, something like that.

Q. The Pauline Gaudette coat wasn't there at the time [139] of the fire?

A. It was listed on the proof of loss, and later it was all right—it was not destroyed.

Q. Referring to the Hague coat, what amount are you claiming to that coat?

Mr. Velikanje: Mr. Hutcheson, may I show him the proof of loss so he can refresh his memory?

Mr. Hutcheson: Yes.

A. Three hundred and seventy-five dollars.

Q. Would you say that was the reasonable value of that coat? A. Yes.

Q. And there was no value on the receipt record?

Mr. Velikanje: That is correct.

Q. By the way, when a coat was brought in merely for repairs, as distinguished from storage, did you issue a receipt for such a coat?

A. Yes. Often times a customer would bring a coat in and just hang it there—literally hang it there saying that she would think about it and come back in an hour or so, and probably she did not get a receipt.

Q. But, in all other cases?

(Testimony of Meryl Kirkevold.)

A. Yes, we had an understanding and had them sign it as a rule so that there would be no slip-up.

Q. Well, you say you made a practice of having the [140] customer sign your receipts.

A. Yes.

Q. Did you do that as to these receipts here?

A. Yes.

Q. What was the reason that, in the considerable number of these instances, there, a receipt was issued but there was no value at all stated on the receipt. How did that happen?

A. Well, that was due probably to negligence on the part of any employee that just did not do it.

Q. Just a mistake made in your office?

A. Yes.

Q. There is no doubt but that the value was supposed to be stated on each receipt?

A. Yes.

Q. You are not making any claim in this case, are you, for any of the additional third party defendants whose names are: Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, Mabel G. Smith, and Erma Turnell—are you making any claim as to those coats?

Mr. Velikanje: I think I can definitely state that we are not.

Q. It is your understanding those were all covered by other insurance? [141] A. Yes.

Q. You made no settlements with any of those yourself? A. No.

Q. And you are not making any claim in the

(Testimony of Meryl Kirkevold.)

case, are you, for Hawk, or Lindsey, or Evans' garments, or Mrs. Harold Warner, or Mrs. Harry Rollis, if I am correct in this statement?

A. No—I mean, we are not making any claim.

Q. You are not making any claim on it?

Mr. Velikanje: Mr. Hutcheson, on your last remark as to claims, the only thing, Dorothy Riggs is a third party defendant now. She has not been defaulted out. We are not making any claim. She is making that claim herself.

Q. In your testimony, I did not get what the value was of Mrs. Jones' coat. Would you mind giving that figure again?

A. M. W. Jones, three hundred and fifty dollars.

Q. In your opinion was that a fair reasonable value of that coat at the time of the fire?

A. Yes.

Q. Referring to the Krause coat, how was it that there was a certificate issued only for a hundred and fifty dollars, and a receipt for—stating a valuation of two hundred dollars? [142]

A. That was one of those cases where a proper—well, the one that wrote the policies or the one that knew of the policies did not write the receipt when she brought the coat in,—just a mistake.

Q. A mistake in your office? A. Yes.

Q. You were aware, of course, of the provision in this policy that the company would not be liable as to any particular coat for more than the valua-

(Testimony of Meryl Kirkevold.)

tion stated on the receipt? You knew that, of course, didn't you?

A. You mean, on the—yes, because that is a report—the valuation that I reported, the valuation, you mean?

Q. No, I will restate the question. You knew, didn't you, that on this policy the insurance company was not liable as to any particular coat for more than the valuation stated on the receipt for that coat?

Mr. Velikanje: Your Honor, I am going to object to that. I think the policy will speak for itself.

Mr. Hutcheson: I am asking if he was aware of it.

The Court: That is true, except where he issued the special policy or certificate, as you [143] call it, signed by the company, and he signed it as their representative.

Mr. Velikanje: I mean, on the general statement as to whether he knew his liability was limited by something in there. He knew the policy would speak for itself, as to that.

Mr. Hutcheson: The policy does not. I think I have a right to ask him whether he was aware of that.

The Witness: Well, my thought is that the valuation that I reported, which I took from the receipt, was what I thought the insurance company would pay off on, if it paid off.

Q. Well, that is not just what I asked you, but

(Testimony of Meryl Kirkevold.)

do I understand that you knew and understood that the liability of the insurance company was limited to the valuation as to any particular coat that was stated on the receipt of that coat?

A. I think that is right.

Q. Will you give us again—I did not get it, what was the fair reasonable value of the Leach coat. That was a Northern Muskrat coat?

A. Leach?

Q. Yes.

A. Two hundred dollars. That was the maximum under [144] for the storage charges.

The Court: Mr. Hutcheson, however, that was a——

Mr. Velikanje: That was a case where she had a certificate.

Mr. Hutcheson: I believe she had a certificate.

Q. You would say the value of the coat was two hundred dollars?

A. Yes, in this proof of loss.

Q. By the way, a considerable number of the settlements that you made with the customers, were by giving or delivering to them coats as distinguished from cash, were they not—replacing coats rather than cash? A. Yes.

The Court: Now, in this Leach case, you gave, according to the record, you made in your direct testimony, you paid two hundred and fifty dollars in cash?

A. Yes, is that what it says on the release?

(Testimony of Meryl Kirkevold.)

The Court: Well, on the release I have before me, and it is admitted here.

Mr. Velikanje: Mr. Kirkevold, that is one she had a certificate policy of two fifty.

The Witness: And I gave her what?

The Court: Two hundred and fifty. [145]

The Witness: Yes.

The Court: Well, did you give her fifty dollars more than you thought the coat was worth? You just testified——

The Witness: I said two hundred dollars.

The Court: You thought two hundred dollars was the fair value of that coat?

The Witness: Oh, I think on that, we probably allowed her that amount on a coat, two hundred and twenty-five.

The Court: This indicated two hundred and fifty. You better get that straightened out. I want to know how much I can depend upon your values.

The Witness: Oh, it is cash two hundred and fifty dollars. I don't know why this two hundred dollars in here——

Mr. Velikanje: Didn't she have a certificate on this?

The Witness: Oh, that was the——we had two hundred dollars on the receipt, but she had this policy——this individual insurance policy which we had to make good, so we paid her cash, two hundred and fifty dollars.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: The question was, what was the reasonable value of that coat? [146]

The Witness: Let's see. Well, I would say that two hundred and fifty dollars would be the valuation, then, because when we write the insurance policy, we try to get as true a valuation as we can.

Mr. Velikanje: Then, your answer is two hundred and fifty, instead of two hundred?

The Witness: Two hundred and fifty dollars, yes.

Q. You want to change your testimony there that the value is two hundred and fifty dollars, rather than two hundred dollars? A. Yes.

The Court: Now, we are going to have to get along a little faster on these, because the Court can not possibly, if there are certain ones that you want to pick out, Mr. Hutcheson to attack, but if you want to attack them all generally, you will have to do it with your direct testimony, rather than take the time on cross examination because we will be here a week. I have got to finish this case tomorrow, and I am going to give you the whole of tomorrow, both of you, to complete the case, but I do not want it to go beyond that.

Mr. Hutcheson: Couldn't we possibly run Saturday forenoon, Your Honor? [147]

The Court: I have something else set on Saturday morning. No, we should finish this case, and I am going to work somewhat longer hours, but the issues are not so complex, as the Court sees them

(Testimony of Meryl Kirkevold.)

now, or since the proof of loss is admitted, are not on items, but are on values, but then we can not take values and make a case of each one of them. It is unnecessary to do that. If you want a description of each one of these—you want him to give one, and have your expert take that description and fix a value other than the values fixed here, the Court will permit that to be done, but to go on at length concerning each of these many items, it is not what we can possibly——

Mr. Hutcheson: I do not intend to do that, Your Honor.

The Court: Of course, an item such as where you just interrogated the witness is perfectly proper, whether he was confused or not, is for the Court to determine when he finally determines the case. I merely make that suggestion. We will work a little longer.

Mr. Hutcheson: Just a few other individual ones I want to ask you about.

Q. With reference to the Bee Metzger coat, you paid her [148] I think you testified, a hundred and forty dollars, and you and she agreed on that valuation rather than six hundred dollars did you?

A. That was a Hudson Seal coat, and replacement was not six hundred dollars, but we settled with her for a hundred and forty.

Q. And I say, you and she agreed on that valuation at the time of the settlement?

A. Yes, she signed the release.

(Testimony of Meryl Kirkevold.)

The Court: On your proof of loss, are you claiming more than a hundred and forty dollars?

Mr. Velikanje: We claim six hundred as a reasonable value of the coat.

Q. Well, are you claiming more against the insurance company in this case, Mr. Kirkevold, than the hundred and forty dollars that you paid as to that coat?

A. We have listed six hundred in the proof of loss.

Q. I did not ask you that.

The Court: The answer is self evident. He paid a hundred and forty dollars and claims six hundred dollars. He is claiming four hundred and sixty dollars more than he paid.

Mr. Hutcheson: Yes.

Q. When a coat was brought in for repairs only, as distinguished from storage, one other question there. [140] Was any charge made against the customer for insurance?

A. When the coat was brought in for repairs?

Q. Yes, for repairs only.

A. No, because it would be there only—supposedly be there a short while, time enough to do the work.

Q. And in your monthly report to the defendant company, did you include any such coats that were there for repairs only?

A. Yes, we always included the total valuation of all coats on hand.

(Testimony of Meryl Kirkevold.)

Q. Based on the values as you stated were on the receipts? A. Yes.

The Court: I want to know if you have any more items such as the one, Mr. Hutcheson pointed out to you where you settled for a given sum and then you put in your proof of loss the sum you thought measured the value of the article.

The Witness: Well, I would have to check that.

Mr. Velikanje: I think, Your Honor, the only other one was the Odell coat, which you referred to that he had a hundred dollars, and I believe that is the only one, except those that we had mentioned going through before.

The Court: I had this one. [150]

Mr. Velikanje: I think those two were both noted before, when we went through.

Q. Referring to the Odell coat, was any receipt ever issued on that coat?

A. No, that customer lived in—lived out of town, and she brought her coat in and was going to advise us when she wanted the work done.

Q. Were there any other—the coats involved in this case, as to which no receipt was ever issued other than Odell? A. Not to my knowledge.

Q. With reference to the Frank Souther coat, you claimed in the proof of loss two hundred and fifty dollars. As a matter of fact that was the fair value of the coat, was it not?

A. Well, I said two hundred—closer to two hun-

(Testimony of Meryl Kirkevold.)

dred and eighty. That would include taxes which had to be considered.

Q. Well, do you mean that when you made out the proof of loss you did not include the full fair reasonable value of the coat as of the date of the fire?

A. Probably on one or two coats at that time we might have missed, or under estimated a little.

Q. You went over the matter very carefully as to these amounts, and at the time you prepared the proof of [151] loss, didn't you?

Mr. Velikanje: I think, Mr. Hutcheson, when he went through there he remarked he would stand on the two hundred dollar valuation instead of two hundred and eighty.

Mr. Hutcheson: That is correct is it?

The Witness: Yes.

Mr. Hutcheson: Very well.

Q. And as to the Rex Tilton coat, did I understand that you are claiming only the seventy-five dollars that was actually paid for it?

A. Yes.

Q. Now, referring to the—I think this is the last individual one I want to ask you about, the Verd coat. As a matter of fact, that was a coat that you were manufacturing or making yourself, wasn't it?

A. Yes.

Q. And had it been manufactured at the time of the fire?

A. Yes, it was already to—I think just put the

(Testimony of Meryl Kirkevold.)

lining in. All the workmanship had been done, except putting in the lining.

Q. Except putting in the lining? A. Yes.

Q. What would you say was the fair reasonable—fair cash value of that coat in the condition that it was [152] just preceding the fire, or at the time of the fire?

A. Well, if we went on the open market and bought it, we would have to pay equivalent to that for that coat. It was a brand new coat. They were new skins in it.

Q. Equivalent of what? A. Three fifty.

Q. What was stated on the receipt as to the value of that coat?

A. The price of the skins, and this is a price including labor—price of skins including labor.

Q. What amount?

A. Well, I have forgotten how many skins she had at that time.

The Court: Well, do you have that receipt here?

The Witness: It must be.

Mr. Hutcheson: That is the receipt, apparently, that was burned.

The Witness: Seventy-six or more muskrats, around sixty-six muskrats. At roughly three dollars a skin, and then we had done all the work on the coat. The labor was all complete, except putting the lining in it.

Q. My question is now, if you can tell us what

(Testimony of Meryl Kirkevold.)

was the value stated on the receipt to that Verd coat, or [153] was there any value stated?

Mr. Velikanje: There was none stated.

The Witness: I doubt if there was a value put on it.

Q. Do you know what value if any you reported to the insurance company, or had you made any report to the company as to the coat?

A. Well, in a way I—there was a number of—the cost of the skins, up until I got the work done on the coat, and then the valuation was up to three fifty.

The Court: The question is do you know whether you made a report to the company?

The Witness: My final report would be three fifty.

Mr. Hutcheson: You say your final report would be there fifty, but had you included anything for the Verd coat in any report you made to the company?

The Witness: Yes, sir, because every thing I had in the work—I mean, in our customers merchandise was always reported—included.

Q. Do you have any record as to the amounts that made up the total you reported for the last report prior to the fire?

A. Well, I think we can get this from our agent. [154]

Q. Well, I don't mean the total. I mean the breakdown, the figures that went to make the total, did you make any list of that?

(Testimony of Meryl Kirkevold.)

A. No, just the total—total of the receipts—just totalled, and just put on one of the insurance company's report.

Q. That showed just the total? A. Yes.

Q. And you did not keep any lists showing the breakdown, how you arrived at that? A. No.

Q. Well, did you actually include a value for the Verd coat in a report to the company prior to the fire? A. Yes.

Q. And do you definitely remember how much you reported?

A. Well, my last report would be three fifty, to my knowledge.

Q. Do you definitely remember that?

A. Well, that is how I got my valuations.

Q. Do you definitely remember including that figure?

A. Yes, because it was included—they were all included.

Q. Well, do you specifically remember including any figure for the Verd coat?

A. Well, just like any other coat, whether I went through my files and the files were burnt to some extent, but [155] we always got our valuations from the files as to coats, and that were in storage, I mean, in the customers goods in the place.

Q. Well, you say from the files. You mean, from the receipts?

A. Yes, from the receipts.

(Testimony of Meryl Kirkevold.)

Q. But the Verd coat showed no value on the receipt.

A. Yes, it had some kind of a valuation on it.

Q. What value did it have on the receipt?

A. Probably had the three fifty valuation.

Q. You say it probably had. Do you definitely remember whether it did or not?

A. I think it did.

Q. But, you don't have any written record now showing the value of it? A. No.

Q. Referring to this diagram here, Exhibit——

The Clerk: Identification 5.

Q. (Continuing) Identification 5——

Mr. Hutcheson: Was it offered in evidence?

The Clerk: It was not.

Mr. Velikanje: I will offer it in evidence.

The Court: It will be admitted in evidence.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 5.) [156]

Q. Referring to Exhibit 5, you referred then to a work room. Will you write on Exhibit 5 the location of the work room, and will you make some marks there X's or whatever you wish to make, showing where the work tables were in that room?

A. Right along this wall (indicating), and right along this wall.

Mr. Hutcheson: Will you make a heavier mark. Will you write "W. T." up on that referring to work table.

A. And up here was a work bench, too.

(Testimony of Meryl Kirkevold.)

Q. Referring to this first one, farthest to the north, was that one long "L" shaped table, or several tables? A. No, there was several.

Q. Several tables? A. Yes.

Q. By the way, the exterior of the building, the upper side—the north side of the diagram, was the alley? A. Yes.

Q. There was no partition of any kind, was there, between what you refer to as the work room, and what you refer to as the store room?

A. Not this way. There was this way (indicating), and this way.

Q. Well, was there any partition of any kind separating [157] the—what you call the work room—from what you call the store room?

A. No, no permanent wall, no. There was an opening here (indicating).

Q. Well, there was no partition to it at all?

A. No.

Q. And nothing to show that they were two rooms rather than one, was there?

A. There were racks just made it that way.

Q. By the way, these racks were moveable racks, weren't they on four wheels?

A. Yes, except this one here was a permanent fixture. (Indicating.)

Mr. Velikanje: That was the one on the north side?

The Witness: Yes.

Q. You made—let's see, did you keep any coats waiting to be worked on that were on the mez-

(Testimony of Meryl Kirkevold.)

zanine here, in the part that you referred as a work room?

A. Yes, we had racks here where I have marked "A" and I have a small rack——

Q. Where you marked it "A," that refers to racks? A. Yes.

Q. I believe you have already stated what is shown on this diagram here, Exhibit 5, is on the mezzanine floor [158] of the store? A. Yes.

Q. And the Barnes-Woodin Store, the street address is 301 Yakima Ave.?

A. I used my address Barnes-Woodin Company. I am not sure, 301. It is right on the corner.

Q. It is so stated in the policy. Now, as you went up the stairs from the main street floor to the mezzanine floor, the stairs being indicated in the lower right-hand corner of the diagram, is that right? A. Yes.

Q. Then, you turn to the left to enter what you refer to here as the "A"? A. Yes.

Q. There wasn't any door at all, was there, at the head of the stairs?

A. No, we had an electric eye here, that when people crossed over here, that would ring a bell, if a person should happen to be there.

Q. However, that was an affair of electricity?

A. Yes.

Q. There was no door, or any thing closing off that passage way? A. No.

Q. Referring to the edge of the mezzanine

(Testimony of Meryl Kirkevold.)

floor, the [159] southern edge here (indicating), was there a rail along there at the south edge of the—what you referred to as the sales' room?

A. Yes.

Q. There was a railing. About how high?

A. I wouldn't say, twenty-four inches—twenty-six inches. I guess it was higher than that, about twenty-six or twenty-eight inches.

Q. Twenty-six or twenty-eight inches?

A. I imagine it is.

Q. In other words, there was no wall there?

A. No.

Q. And on the door on the west side what is referred to here as the sales' room, as I understand those were show cases there, weren't they from the floor? A. Yes.

Q. Did they go clear to the ceiling?

A. Yes.

Q. And then between what you referred to here as the sales' room and the work room, referred to here on Exhibit 5, there was this opening shown here, but there was no door?

A. No, just an opening.

Q. Just an opening, just about the way this part in the upper left-hand corner of the diagram—that was [160] merely a stairway, winding stairway going down to the west side of the building on North Third Street?

A. Up and down, it went up to the third floor and down to the street floor.

Q. Yes. Well, up to the second floor?

(Testimony of Meryl Kirkevold.)

A. Yes.

Q. Let's see, how many floors in that building, three floors?

A. There is three floors, and what they call a balcony.

Q. Three floors and this mezzanine floor?

A. Yes.

Q. A basement, is there? A. Yes.

Q. This floor that we are talking about now, is always referred to as the mezzanine floor, isn't it?

A. Yes.

Q. And then the next floor above this is always referred to as the second floor?

A. Second floor, that is right.

Q. At this time—at the time of the fire, there was a storage room or vault on the second floor—the next floor above this? A. Yes, sir.

Q. And about what was the size of that room at the time of the fire? [161]

A. Oh, I would say that was 15 by 12, something like that.

Q. Either you or the department store itself, have remodeled and changed the location and arrangement of your department since then?

A. Yes.

Q. By the way, there weren't any—you recall Mr. Sinclair, and also Mr. McKinley, two insurance adjusters for the defendant? A. Yes.

Q. And Mr. Sinclair worked on this matter first, and then later Mr. McKinley? A. Yes.

Q. And there wasn't any change, was there—

(Testimony of Meryl Kirkevold.)

no remodeling occurred until after Mr. McKinley had been there and inspected the premises?

A. Yes, sir, he had seen how the place was laid out.

Q. Before there was any change or remodeling?

A. Yes.

Q. Referring to the storage on the second floor, there were at the time of the fire, of course a very large number of fur coats in storage there, were there not? A. Yes.

Q. Just approximately how many were up there? [162]

A. Oh, probably five or six hundred. I am not sure.

Q. But in any event, a very much larger number were in the storage room on the second floor, than were on the mezzanine floor, that is correct, isn't it? A. Yes.

Q. And was any damage done at all to any of the coats that were in the storage room on the second floor? A. No damage.

Q. Were all of the fur coats—I am not referring to the sales' room, but in this work room or what you call the store room, were all of the fur coats that were there at the time of the fire damaged to some extent? A. Yes.

Q. Were all of them destroyed, or——

A. Well, there was several, one or two that we have listed here that we have taken back, like the Guadette coat and Warner coat. I think there are two or three that no damage was done.

(Testimony of Meryl Kirkevold.)

Q. Of the coats that you are making a claim for in this case, was there actually any salvage value as to any of those coats?

A. No wearable salvage value. There might have been a skin or two that possibly you could have used.

Q. The value would be relatively small for salvage? [163]

A. Yes, relatively small.

Q. You say there were not more than just a few coats on the mezzanine floor that were not damaged by the fire, is that right?

A. Yes, just what we have got stated here.

Q. Yes. Referring to the storage room on the second floor, you had a cooling apparatus?

A. We had circulating fans.

Q. During the summer, in Yakima, it gets pretty hot, doesn't it?

A. Yes.

Q. And it is desirable, isn't it in fur storage, as I believe you stated in your advertising, to store fur coats in a refrigerated place, or at least a place that is artificially cooled?

A. Well, we never in our advertising, I don't think, that we have mentioned freezing or anything, because we did not have a freezing temperature. We just had a cool conditioned place.

Mr. Hutcheson: I think you may be seated,—

Q. The cold storage place was the one on the second floor, wasn't it?

A. Yes.

Q. You didn't have any cooling apparatus, so far as the fur coats were concerned, on the mezzanine floor, [164] did you?

A. No.

(Testimony of Meryl Kirkevold.)

Q. In the summer time it got pretty hot there, didn't it? A. Some days.

The Court: Did you store coats on this floor, or did you just have them stored for the purpose of meeting the employment conditions?

The Witness: That is right, they were stored there till we could work on them, and get them up.

Q. But when you finally stored them for any degree of permanency, you took them upstairs?

A. Yes.

The Court: Are you about through now?

Mr. Hutcheson: Well, no, it will take me some little time.

The Court: Well, we will just have to speed this up, Mr. Hutcheson. There are certain points in this case the Court can take over the interrogation of the witness, but I don't want to do that. There is only a few points in this case that I want to have cleared up, and I could pass upon it then, and one of them of course is this question, whether or not this was a storage room within the terms and conditions of the contract of insurance. [165]

Mr. Hutcheson: That is a very important question in the case.

The Court: And the other is, if it were such, how much was outside of it, because it is estimated now, I believe this witness said about twenty or twenty-five per cent of the merchandise he claims a loss on was outside of this place where he kept them for repairs and checking up, isn't that right?

The Witness: Yes.

(Testimony of Meryl Kirkevold.)

The Court: And then, what he had in storage and paid insurance on upstairs was not—is not involved here because it was not affected by the fire.

The Witness: No damage, no.

Q. Now, just what do you mean by this segregation of this seventy-five per cent and twenty-five per cent? I know you mentioned that on direct examination.

The Court: The Court has that pretty well in mind, and if I am wrong I want him to correct me, that when a customer brought a coat in, instead of it being taken into this place you call a storage place on the mezzanine floor, it was put on a hangar on the outside for certain work or until you could reach a certain stage and put it on the inside, is that right?

The Witness: No, the coat was taken into [166] the storage room until we could take it out and work on it, and finish our work, and take it upstairs.

The Court: Then, the twenty or twenty-five per cent of your losses, by this fire, were those that were being worked on at the time.

The Witness: That is right.

The Court: And the others were waiting?

The Witness: Waiting work.

Q. In other words, twenty-five per cent *would* in what you call the work room, and seventy-five per cent in what you call the store room?

A. That is right.

The Court: And the twenty-five per cent in the work room, are those that come in earlier than

(Testimony of Meryl Kirkevold.)

those you say you had in this mezzanine store room?

The Witness: Yes.

The Court: And you tried to give precedence as to date when they brought them in?

The Witness: That is right.

The Court: I think we will have to adjourn to-day, but we will have to make better time than this tomorrow, and I am trying to point out to the counsel what the Court thinks, if we are going to have a hundred or a hundred and fifty items I will appoint a Master, because my time is too valuable, under [167] the circumstances. I have been away from my own court for six weeks. It will take days to do that.

Mr. Hutcheson: I will just ask the witness as to this:

Q. That is your signature, isn't it?

A. Yes.

Mr. Hutcheson: We offer in evidence, application for insurance.

The Court: What is it?

Mr. Hutcheson: It is the application for insurance.

Mr. Velikanje: I would like an opportunity to look it over. Is that all right with you?

The Court: That is his signature?

The Witness: Yes.

The Court: I think I shall admit it and the Court will be recessed until 9:30 o'clock tomorrow morning.

INLAND MARINE

Defendant's Exhibit "A"
PROPOSAL FOR

IM 2091 U
Edition Dec 4

FURRIERS' CUSTOMERS POLICY

This Proposal must be completed and signed in duplicate
It is essential that ALL QUESTIONS be answered FULLY. Quotations cannot be given on incomplete Proposals

NOTE: "Customers' Property" wherever used herein refers to customers' furs or customers' garments trimmed with fur

Section One PROPOSER
1. Name Meryl Kirkebold d/ba Barnes-Woodin Fur Dept.
2. Principal place of business 301 E. Yakima Ave, Yakima, Wash.
3. Nature of business Fur coat sales

4. (a) Peak Values of Customers' Property (over all locations) during any twelve consecutive months or preceding twelve months were \$ on and \$ on

(b) Name of present carrier of Furriers' Customers' Policy Northwestern Mutual Fire Ass'n.
Attaching date of such policy

5. LOSS EXPERIENCE:
(a) Has Proposer, during past five (5) years, suffered any loss, involving Customers' Property no
(b) If so, give full particulars (on separate sheet if necessary) including name of insurer if any

6. Locations (all) used for storage of Customers' Property.

	Address	Floor or Section	Building Operated by
A.	<u>301 E Yakima Ave, Yakima, Wash</u>	<u>2nd</u>	<u>Barnes-Woodin Fur Dept</u>
B.	<u> </u>	<u> </u>	<u> </u>
C.	<u> </u>	<u> </u>	<u> </u>
D.	<u> </u>	<u> </u>	<u> </u>

NOTE: Separate "Description of Storage Enclosure and Location" Rider must be completed for each Storage Enclosure, except where storage is at premises NOT operated by Proposer; then it may be omitted unless or until specifically requested by Company

7. With respect to storage locations NOT OPERATED BY PROPOSER, specify,
(a) Those at which a separate storage enclosure is maintained for Proposer's exclusive use (this refers to an entire vault or room, not to a stall or other subdivision thereof)
(b) Any which may be in same building (but under a different street address) with Proposer's principal place of business

Section Two INSURANCE
(Forms and Limits needed)

1. BASIC POLICY (Custody form only):
Limits of Liability:
(a) At Locations where Customer's Property is Stored

Location	In Storage Enclosure	Outside Storage Enclosure
<u>301 E. Yakima Ave</u>	<u>\$ 100,000</u>	<u>\$ 10,000</u>
<u> </u>	<u>\$</u>	<u>\$</u>
<u> </u>	<u>\$</u>	<u>\$</u>
<u> </u>	<u>\$</u>	<u>\$</u>

(b) At Locations Not Used for Storage

Proposer's Premises - - - - \$ <u> </u>
While in Transit - - - - \$ <u>5,000</u>
At Any Other Location - - - \$ <u>5,000</u>

2. OPTIONAL EXTENSIONS
(a) Certificates (is Certificate privilege desired?) yes
(b) Excess legal liability: \$ limit any one garment, \$ limit any one catastrophe.

Signing this Proposal does not bind the Proposer to complete the insurance, but it is agreed that the information contained herein and in the "Description of Storage Enclosure and Location" Rider(s) attached hereto shall be the basis of the contract should a Policy be issued. If any of the questions therein have been answered fraudulently, or in such a way as to conceal or misrepresent any material fact or circumstance concerning this insurance or the subject thereof, the entire Policy shall be void

I/We have read the above and the "Description of Storage Enclosure and Location" Rider(s) attached hereto and agree that to the best of my/our knowledge and belief same fully represents the true state of facts

Meryl W Kirkebold
Signature of Proposer
Date 8/20/66
Title owner

ATTACH DESCRIPTION OF STORAGE ENCLOSURE AND LOCATION RIDER(S) HERE.

DESCRIPTION OF STORAGE ENCLOSURE AND LOCATION
(To be attached to Furrer's Customer's Proposal)

Description of Storage Location at 301 E. Yakima Ave

as follows:

1. STORAGE LOCATION GENERALLY:

Construction of Building (i. e., Frame, Brick, Mill, Reinforced Concrete, etc.) Mass w/ brick
On which floor is storage enclosure located (i. e., basement, first, second, etc.) cond

2. STORAGE LOCATION AND STORAGE ENCLOSURE
BURGLARY PROTECTION (See Notes 1 and 2 below)

STORAGE
LOCATION

STORAGE
ENCLOSURE

(a) Indicate (By Yes or No) whether the following are Protected by An Alarm System Connected With An Outside Central Station

- | | |
|--|----|
| (1) All Accessible Windows (Except Stationary Show Windows) - - - | no |
| (2) All Doors - - - - - | no |
| (3) All Transoms - - - - - | ✓ |
| (4) All Skylights - - - - - | ✓ |
| (5) All Other Openings - - - - - | ✓ |
| (6) All Ceilings - - - - - | ✓ |
| (7) All Floors - - - - - | ✓ |
| (8) All hall, party partition, and building walls (except building walls which are exposed to street or public highway, and except that part of any building walls which is at least two stories above roof of an adjoining building or other structure) - - - - - | ✓ |
| (9) State type, grade and certificate number - - - - - | ✓ |

(b) Indicate (By Yes or No) whether the following are Protected By An Alarm System Connected With A Loud Sounding Gong or Siren on Outside of Building and Operated in Conjunction with Watchman Service Described in Section "C" Following

- | | |
|--|----|
| (1) All Accessible Windows (Except Stationary Show Windows) - - - | no |
| (2) All Doors - - - - - | ✓ |
| (3) All Transoms - - - - - | ✓ |
| (4) All Skylights - - - - - | ✓ |
| (5) All Other Openings - - - - - | ✓ |
| (6) All Ceilings - - - - - | ✓ |
| (7) All Floors - - - - - | ✓ |
| (8) All hall, party partition, and building walls (except building walls which are exposed to street or public highway, and except that part of any building walls which is at least two stories above roof of an adjoining building or other structure) - - - - - | ✓ |
| (9) State type, grade and certificate number - - - - - | ✓ |

(c) Watchman Service

STORAGE LOCATION

- | | |
|--|-----|
| (1) How many Private Watchmen are maintained, at one time, within the premises - - - - - | one |
| (2) Are all such Watchmen on duty at all times when premises are not regularly open for business - - - - - | yes |
| (3) If not, when are such Watchmen on duty - - - - - | no |
| (4) Do such Watchmen signal to a Central Station at least hourly - - - | no |
| (5) If not, do such Watchmen register on a Watchman's Clock, at least hourly - - - | no |

NOTE (1) Accessible windows are those windows not more than 18 feet above the ground, or roof of an adjoining building or projection, or from an extension, or from a ledge or fire escape or other structure. Windows above the first story of the building and which front on a public thoroughfare and which are more than 18 feet above the ground are not considered accessible.

NOTE (2) A Police Station may be classed as a Central Station provided there is a regular policeman on duty therein at all times.

1. STORAGE ENCLOSURE ONLY:

- (a) Size - - - - - Width
(b) Number of Openings - - - - - Doors
(c) Construction of Walls, Floor and Ceiling

20
1

Length 20
Windows

Height 12
Vents

Material

WALLS Thickness

FLOOR Thickness

CEILING Thickness

Wood and/or Plaster Board - - - - -	6	inches	12	inches	12	inches
Cement or concrete blocks - - - - -		inches		inches		inches
Hollow Tile - - - - -		inches		inches		inches
Brick - - - - -		inches		inches		inches
Plain Concrete - - - - -		inches		inches		inches
Reinforced Concrete - - - - -		inches		inches		inches
Granite or Stone - - - - -		inches		inches		inches
Steel - - - - -		inches		inches		inches
Steel Lining - - - - -		inches		inches		inches
		inches		inches		inches
		inches		inches		inches

NOTE: If all walls are not of same construction, classify walls as Nos. 1, 2, 3, and 4, and designate type of construction of each.

(d) Description of Doors of Storage Enclosure

- (a) State type (ordinary, refrigerator, fire or vault) - -
(b) Name of Manufacturer - - - - -
(c) State classification of Underwriters Label - - - - -
(d) If refrigerator or fire door state thickness - - - - -
(e) If Vault Door
(1) State thickness of steel exclusive of bolt work - -
(2) Is door equipped with combination lock? - - -
(3) Lock Manufacturer's Name and Number - - -
(f) If not equipped with combination lock, describe lock -

OUTER DOOR

INNER DOOR

ordinary with talc lining

inches inches

inches inches

no

key lock - Sargent

Mayl W. Pickersold

Signature of Proposer

Date 8/20/42

THIS SECTION MUST BE COMPLETED AND SIGNED BY THE COMPANY

Give promulgated fire co-insurance rate in each case, i. e., 80%, 90% or 100%.

Fire Contents Rate (Furs) at storage premises outside of vault 548

Subject to 100% Co-Ins

Fire Contents Rate (Furs) if published, in vault at storage premises 466

Subject to 100% Co-Ins.

Date 8/20/42

Signature of Company Representative

CLERK

PAUL P. O'BRIEN

JUL 8 - 1946

FILED
FROM THE NINTH CIRCUIT
UNITED STATES COURT OF APPEALS
11876

910

Cur-210

Defendant's Exhibit B-1

KIRKEVOLD FURS

YEAR 1945

PROFIT AND LOSS

SALES

87508.53

Cost of Goods Sold

Inventory 1-1-45	17590.34
Purchases	55939.88
Freight	<u>330.52</u>
	73860.74
Less Inventory 12-31-45	<u>22862.27</u>
Cost of goods sold	

50998.47 58,22
36600.06 41,78

Deductions:

Salaries	9435.80
Rentals	10883.40
Insurance	2564.14
Supplies	591.80
Repairs	32.60
Legal	56.97
Advertising	1902.00
Tel and Tel	70.44
Dues and Subscriptions	15.27
State Business Tax	304.87
Industrial Insurance	29.84
Social Security	308.17
Depreciation	<u>82.75</u>

26278.05 29,99

Net Profit from operations
Insurance Income on fire loss

10322.01 11,78
5890.00

Net Income

16212.01

Distribution of Profits

Erle Kirkevold	4053.00
Meryl Kirkevold	<u>12159.01</u>

16212.01

EXPLANATION OF DEPRECIATION

KIND OF PROPERTY	ACQD	RATE	COST	PREV YEARS	THIS YEAR
Furniture and fixtures		10%	250.60	25.06	25.06
" " "	1944	10%	168.78	16.78	16.88
" " "	1945	10%	<u>4080.62</u>		<u>40.81</u>
			4500.00	41.93	82.75

(Whereupon, application for insurance referred to was then received in evidence and marked Defendant's Exhibit A.)

(Whereupon, adjournment was then taken until 9:30 o'clock a.m. March 8th, 1946.) [168]

March 8, 1946, 9:30 o'clock a.m.

The Court met pursuant to adjournment, all parties present.

MERYL KIRKEVOLD

resumed the stand for further examination and testified as follows:

Cross Examination (Resumed)

By Mr. Hutcheson:

Q. Mr. Kirkevold, were there any work tables or anything other than racks for fur coats in the part of this room in which you call the store room?

A. On the back end there was shelves that we kept fur pieces.

Q. Shelves that you kept fur pieces?

A. Yes.

Q. That were owned by you? A. Yes.

Q. Part of your stock? A. Yes.

Q. Were there any tables or sewing machines, or anything of that kind in this westerly part of the room there, [169] where you have the store room? A. No.

Q. At the time of the fire, there was an abnormally large amount of fur coats on the mezzanine floor, wasn't there? A. Yes.

Q. Why was that, were you short handed, or—

A. That was one of the reasons we were short

(Testimony of Meryl Kirkevold.)

handed, but it had just started in the storage season. The weather I imagine, had got warm enough so people started bringing them in at that time, because that was early—the starting of our season.

Q. Ordinarily of course, you would not have had that many fur coats on the mezzanine floor, would you?

A. Oh, all during the season we have coats coming in from then on through the season, there would be that many coats, or more.

Q. But, you say this was an abnormal amount to have?

A. It was not abnormal. It was early in the season. That is what happened when the fire started, all these coats were there and then throughout the season the coats were there.

Q. There isn't any reason is there, that you can't do repair work on a fur coat after it has been in the second floor storage room—you get what I mean, [170] in other words, the middle of the summer take it out of the storage room upstairs and do repair work on it, and return it to the storage room? I understand you did not do it that way, but that can be done, can't it?

A. That can be done. The reason we didn't do it that way, is because when the coat went in the second floor store room, I wanted them cleaned and fixed up before they went in there. I just did not want to stick in a lot of coats as they came in. They had to be gone over in that way. I kept my second floor storage room clean.

(Testimony of Meryl Kirkevold.)

Q. How many employees did you have there at the time of the fire?

A. I think there were five persons there.

Q. Five persons. Did one of them work in what was referred to as the sales room? A. Yes.

Q. And four of them worked in the work room?

A. Yes.

Q. Were you there yourself the day of the fire, before the fire occurred? A. What was that?

Q. Were you there yourself the day of the fire, before the fire occurred? A. No. [171]

Q. I believe you stated yesterday that you were farming at that time, were you? A. Yes.

Q. And how long had you been farming?

A. Oh, for six or eight months, something like that.

Q. You were serving your country, on the food crop, in other words? A. Yes.

Q. Referring to the second story storage room on the second floor, ordinarily there wouldn't be anybody in that room, would there?

A. In where?

Q. There wouldn't be anybody ordinarily in the storage room on the second floor. In other words, now and then, an employee might take in a fur coat or two, but generally speaking that room would be vacant as far as human beings were concerned, isn't that right? A. Yes.

Q. Was it ordinarily kept locked at that time?

A. Yes, during night times, not always in the daytime.

(Testimony of Meryl Kirkevold.)

Q. At the time of day that this fire occurred, was about 5:40, wasn't it, or thereabouts, p.m.?

A. Yes, sir.

Q. The closing time of the store was 5:30 p.m.?

A. Yes. [172]

Q. And this was just a few minutes later, probably started from somebody's cigarette thrown away, don't you suppose?

A. I am not sure. I was not there. They say it was wiring.

Q. Anyway, you don't know what was the cause of it? A. No.

Q. How long had you engaged—how long had you been owner of the fur business—that is, your own boss?

A. Since March—or any fur company?

Q. Barnes-Woodin? A. Since March, '42.

Q. And prior to that had you owned your own fur business, or had you been an employee?

A. I had been in business here in town prior to that.

Q. I see, and when did you first go into the fur business for yourself? A. In 1938.

Q. '38, and where were you located before that?

A. Over Carothers Jewelry Store.

Q. You mentioned yesterday that occasionally there might be some fur coats in the basement. There would be very few in the basement, wouldn't there? That is, that was the shipping room, was it?

A. Shipping room, yes. [173]

(Testimony of Meryl Kirkevold.)

Q. And they did not remain in the basement—that is, if they went down there they were shipped rather promptly, weren't they?

A. Yes, they probably were.

Q. In other words, they would really be in transit if they were in the basement, wouldn't they? That is, part of the shipping process?

A. Well, unless they happen to come in late in the evening and stayed there overnight, or waiting for shipment, or something like that.

Q. Yes. Was there any part of the entire Barnes-Woodin Store or where fur coats of customers were kept, outside of the storage room on the second floor, and outside of this room on the mezzanine floor? Those were the only two places, weren't they, in the entire store where fur coats of customers were kept?

A. On the mezzanine and on the second floor?

Q. Yes.

A. Well, in the shipping room there could be customers' coats.

Q. Well, that is what you just referred to?

A. Yes.

Q. Just the one or two there, and they would be shipped within twenty-four hours, is that right?

A. Probably that would be the way it would be.

Q. And that is all, isn't it? Those were the only parts of the store? A. Yes, as far as I know.

Q. I noticed in Exhibit 6 you advertised that customers' fur coats were insured against moths. Of

(Testimony of Meryl Kirkevold.)

course, you knew that this policy did not cover moth damage, didn't you?

A. Well, our advertising was just merely the fact while we had the fur in safe keeping there wouldn't be any moths get into it.

Q. That is what you meant. By the way, you didn't have any other insurance that you procured yourself, covering customers' coats, did you other than this policy?

A. Well, not to my knowledge. I just took my insurance from Hargraves and Orkney.

Q. Well, this was the only policy you held, so far as customers' coats was concerned, wasn't it?

A. As far as I know.

Q. Did Mr. Orkney suggest at one time or another that, referring to this ten thousand coverage, outside of storage rooms he suggested that be increased from what it was originally, \$5,000 to \$10,000, didn't he? Do you remember that?

A. I don't remember that he did.

Q. Do you recall whether you told him you wanted the [175] ten thousand as to that classification?

A. I know I did not. I mentioned it, but I don't remember when it was done, even.

Q. By the way, the situation—the arrangement of rooms and the method of carrying on the fur department and all of that, was the same, wasn't it, when this insurance was taken out—applied for and issued in August, 1942, as it was at the time of the fire?

(Testimony of Meryl Kirkevold.)

A. No. After I came in—after I had been in there, I think it was in '43 that we did our own remodeling in the back of the shop there.

Q. Just what changes, if any, did you make in '43?

A. Well, I built this main storage rack in the back—in this storage room in the back part of the mezzanine, and cleared off space so that I could put more racks in there.

Q. That was all you did, you just added additional racks there? A. Put up partitions.

Q. Well, what partitions did you put in there in '43? A. The partition on the west side.

Q. Will you just point out on the Exhibit?

A. This partition in here (indicating).

Mr. Velikanje: That would be the south side, wouldn't it? [176]

The Witness: South Side.

Q. Marked "P" here (indicating)?

A. Yes.

Q. There were a considerable number of racks in that room in 1942, were there?

A. No, prior to my coming there that was an office space of the newspaper, the man that wrote the ads used to have offices back in there, and we—

Q. You say—I am not interested in that. You say you came there in March, 1942? A. Yes.

Q. You had racks for keeping fur coats that you worked on in that room, didn't you, in March, 1942, on? A. That space was not large enough.

The Court: Speak a little louder.

(Testimony of Meryl Kirkevold.)

The Witness: The space was not large enough. There was a little room where you could walk back, but it was not large enough to have coats or racks or anything in there.

Q. Wasn't the size of the room the same in August, 1942, as it was at the time of the fire?

A. No.

Q. Just explain what difference there was.

A. Well, this partition was put in there.

Q. Well, yes, you have told us that, but everything north [177] of the partition remained just the same in August, 1942, and at the time of the fire, didn't it? A. I don't quite understand.

Q. Well, the general arrangement of the room there, you told us you put in a partition there some time in '42, other than that everything north of the partition, the arrangement of the room and so forth remained the same, didn't it, in August and at the time of the fire?

A. No, because we put in the racks

Q. You put in some additional racks?

A. And shelves in the back.

Q. There were some racks already there, weren't there, in August, 1942?

A. There could have been a rack in there, but there wasn't—we put in the racks permanently, the long rack along the ceiling and the shelves and fixed it so we could put racks in there.

Q. Well, there were racks there, however, in the spring of '42, weren't there?

A. No, because we did not need that space.

(Testimony of Meryl Kirkevold.)

Q. Isn't it a fact that in 1942 the first year you were there, that fur coats that were waiting to be worked on, that you kept them in that room the same as you did in '44? [178]

A. There were probably coats back there at different times.

Q. Well, just answer my question. Isn't it a fact, to be fair, Mr. Kirkevold, didn't you keep fur coats that were waiting to be worked on in that room on the mezzanine floor in '42, the same as you did in '44? A. No.

Q. Well, where did you put them in '42?

A. We had coats hanging all over. This was all different. The plan was different in here. As far as hanging—hanging space and work tables.

Q. The room itself, other than the partition, and you say you added some additional racks—other than that, the room itself was the same, wasn't it, in '42 and '44? A. No, we changed the room.

Q. What other changes did you make? Tell us every change you made.

A. Well, this partition was not up there.

Q. You told us that.

A. Well, I put these racks up here, and I put the shelves back here.

Q. Anything else?

A. No, I can't think of anything.

Q. Now, you have not answered my question yet. Isn't it a fact that you used the same method in 1942 and 1943 [179] as you did in 1944, namely that fur coats of customers that were waiting to be re-

(Testimony of Meryl Kirkevold.)

paired or worked on, you kept them there in the mezzanine floor, rather than in the storage room on the second floor?

A. Oh, we always had coats hanging all over down here.

Q. You always did, and that was true in '42, also? A. Yes.

Q. And the coats that were hanging there in 1942 and '43, were coats that were waiting to be worked on the same as in '44. That is right, isn't it?

A. Well, that could be, yes.

Q. Well, that is a fact, isn't it? A. Yes.

The Court: Well, was this room used for any purposes other than hanging coats that were waiting processing in '42, before the partition was built? Was any other use being made of the room?

The Witness: By us?

The Court: By you or anybody else.

The Witness: Well, I don't know whether we have worked back there or what we did back there at that time.

The Court: Well, did anybody else use it?

The Witness: No outsiders that I know of.

Q. What was it you said about writing copy, or something? [181]

A. Oh, they had a newspaper office in there, yes.

The Court: Well, that is what the Court is asking you.

The Witness: Well, that was the time before.

(Testimony of Meryl Kirkevold.)

The Court: Prior to the time you made the changes you testified to?

The Witness: Yes, sir.

The Court: Did they continue in there after you took a lease on the property?

The Witness: No, they moved to the second floor.

The Court: They moved out after you took the lease?

The Witness: Yes.

The Court: All right now, proceed. Let's get along.

Q. In other words, that ceased in March, in 1942, when you moved in there? A. Yes.

Q. After the fire, you increased the amount of the coverage outside the storage room, didn't you, as shown by that rider?

A. I think Mr. Orkney did it, yes.

Q. At your request? [180]

A. Well, he suggested it.

Q. You consented to it? A. Well, yes.

Q. I did not ask you this yesterday. The original receipt you always delivered it to the customer at the time they left their coat there, didn't you?

A. Yes.

Q. And then you kept a copy of the receipt?

A. Yes.

Q. And these receipts never were sent to the insurance company, were they?

A. These customers' receipts?

Q. The customers' receipts. A. No.

(Testimony of Meryl Kirkevold.)

Q. I assume that you made some profit on the replacements of the coats, didn't you, for the customers? That is you paid for them of course at the wholesale price?

A. We purchased the coats at a wholesale price, but had to sell them at retail.

Q. Yes, so that you had a favorable margin there between the two prices on these replacements of coats? A. I wouldn't say it was favorable.

Q. Well, there is of course a substantial difference, isn't there, on fur coats between the wholesale price and retail price? [182]

A. Yes.

Q. And the replacements were made generally speaking, on the basis of the retail price, weren't they? A. Yes.

Q. Referring to the payment here, it is admitted in the pleadings that eighty-two hundred dollars has been paid by us to you. The first \$5,000 was paid October 30th, 1944, was it not? Is that date approximately correct?

Mr. Velikanje: I will have to look up my figures on that.

The Witness: I am not sure.

Q. And the other payment of thirty-two hundred dollars, I believe, on January 15, 1945?

Mr. Velikanje: I think that is approximately so.

Mr. Hutcheson: Will you check?

Q. You never notified the insurance company at any time, did you, Mr. Kirkevold, of the fact that

(Testimony of Meryl Kirkevold.)

on some of these receipts your employees omitted to write any valuation? A. No.

Q. You never notified them of that?

A. No.

Q. And you never notified them that in some instances [183] certificates were issued for different amounts than the value stated on the receipts. You never notified them of that, did you?

A. Well, by just writing a policy.

Q. I say, you never notified the Home Insurance Company of that, did you?

A. That we wrote the policy?

Q. No, I will repeat it. You never notified the Home Insurance Company before the fire that you had issued certificates for different amounts to some of these customers than the values stated on their receipts?

A. Well, the only way I would notify them would be by sending in a copy of it—their copies of the policy that we wrote.

Q. You sent them copies of the certificates?

A. Yes.

Q. But not copies of the receipts?

A. No, no.

Q. And so you never did notify them, did you, before the fire that there was a difference in the amount as between the certificates and receipts?

A. No.

Q. You were authorized by the insurance company, weren't you, to issue these certificates only in

(Testimony of Meryl Kirkevold.)

the accordance [184] with the provisions of this basic policy—the principal policy here?

A. Well, yes.

Mr. Hutcheson: Are those dates correct?

Mr. Velikanje: The one date is October 30th and the other one is February 6th.

Mr. Hutcheson: October 30th, 1944, was the \$5,000 payment and February 6th, 1945, the thirty-two hundred dollar payment?

Mr. Velikanje: That is correct.

Q. At the time of the fire, you told a reporter of the Yakima Daily Republic, didn't you, that the fire occurred in the alteration room of the store, of the fur department of the store?

A. Not to my knowledge, because I did not know anything about the fire. I mean, I did not know where it started.

Q. How long after the fire were you there?

A. Oh, when the fire was out. Well, I was probably there half or three-quarters of an hour afterwards.

Q. Was it still burning at that time?

A. Well, it was heat there. I don't know whether there was any flame.

Q. Well, it was very evident that the fire was in the work room, wasn't it? [185]

A. Well, that is where all of the damage was done.

Q. Yes, but you did not tell them, that that occurred in the alteration room?

A. Not that I know of. I don't think I did.

(Testimony of Meryl Kirkevold.)

Q. You noticed, of course, that was in the Republic the next day. The article said it occurred in the alterations room of the fur——

Mr. Velikanje: I object.

The Court: Objection sustained.

Q. In the application which you signed, defendant's Exhibit "A," you noticed this, didn't you, paragraph 6 say:

"Locations all used for storage of customers' property."

Then there is a blank to be filled, address, 301 East Yakima Avenue, Yakima, Washington, floor second, operated by Barnes-Woodin Fur Department," that is correct, isn't it?

A. Well, I don't remember.

Mr. Velikanje: I think the instrument speaks for itself, Your Honor.

A. I see that.

Q. In other words, in the application you told the insurance company the only place where customers' furs were stored, was on the second floor, is that right? [186]

A. Well, I just talked with Mr. Orkney and told him I wanted insurance, and I don't know what he did.

Q. Never mind that. That is what is stated in——

A. That is what it says there, yes.

Q. And you signed it? A. Yes.

Q. You read it before you signed it?

A. I probably glanced at it.

Q. And then——

(Testimony of Meryl Kirkevold.)

The Court: Who wrote the application?

The Witness: Mr. Orkney, probably.

Q. And then a little further down on the same page it says:

“Basic policy, custody form only: limits of liability. A. At locations where customers’ property is stored.” Then it says “In storage enclosure one hundred thousand. Outside storage enclosure ten thousand.”

It looks like a five thousand is changed to a ten thousand, doesn’t it? A. Yes.

Q. And you signed that, so stating, didn’t you?

A. Yes.

Q. That the coverage was to be so limited, and then on the second page it says, “Storage location generally: [187] Construction of the building” and so forth, and then “On which floor is storage enclosure located, that is, basement, first, second, and so forth” that says “second.”

A. That says “second,” yes.

Q. It does not say anything about the mezzanine floor, does it, anywhere? A. I don’t see any.

Q. Then, on the other side of the last page—by the way, that is your signature also, isn’t it?

A. Yes.

Q. You signed this, and “Storage enclosure only; size, width 20, length 20, height 12, doors,”—that, of course, referred to the room on the second floor, doesn’t it? Wasn’t that the size of the room?

A. Approximately, I would say.

Q. Then, “Wood or plaster board walls, thick-

(Testimony of Meryl Kirkevold.)

ness 6 inches, floor thickness 12 inches." That refers to the storage room on the second floor, doesn't it?

A. Well, I couldn't say exactly, because I never measured it.

Q. Well, would that be approximately correct?

A. No doubt it was approximately correct.

Q. That was not the size of this room on the mezzanine that we have been discussing, was it? [188]

A. No.

Q. You had a number of—you are acquainted of course with the two adjusters, Mr. McKinley and Mr. Sinclair? A. Yes, sir.

Q. And of course you—after the fire you talked to both of them a number of times?

A. Yes.

Q. And you had a number of conversations with Mr. Sinclair, you recall, don't you? A. Yes.

Q. And isn't that a fact that you stated in substance to Mr. Sinclair during those discussions after the fire, that you did not have enough insurance coverage under this policy to cover the loss of the customers' coats in this fire?

A. I never——

Mr. Velikanje: Your Honor, I am going to object to that. I do not think it is material to this. The insurance company has requested and secured a waiver in this matter, a non-waiver agreement to be used for the purpose of communication and settlements without either side incurring liability, and

(Testimony of Meryl Kirkevold.)

I do not believe now they can come in and use such conversations whether that is correct or not, [189] and use that as a basis—as a defense in this action.

Mr. Hutcheson: The effect of a non-waiver agreement, the company does not waive anything by investigating the fire.

Mr. Velikanje: I think it works both ways in that, Your Honor.

The Court: Let's proceed. I will have to overrule the objection. It may or may not have value in impeaching the credibility of this witness.

Q. You may answer.

A. Not to my knowledge.

Q. And didn't you also state to Mr. Sinclair in those conversations that you wondered whether Mr. Orkney, the agent, could arrange it so that the insurance company would make up the difference, or the shortage between the amount of your insurance coverage and the amount of your loss on customers' coats? A. I can't recall saying that.

Q. You can't recall that, and didn't you further state to him that in any event the profits you would make on replacing coats as distinguished from cash settlements with customers, to some extent would reduce your loss by reason of your not having sufficient insurance coverage to take care of the loss of customers' coats? [190]

A. I can't remember saying anything like that.

Q. You can't remember? A. No.

Mr. Hutcheson: That is all.

(Testimony of Meryl Kirkevold.)

Redirect Examination

By Mr. Velikanje:

Q. Mr. Kirkevold, on these certificates that you issued, *when* these parties paid additional premium for those certificates, did they not?

A. Yes.

Q. Was that certificate money then turned over to the insurance company?

A. Yes, that was sent in additional to the monthly report.

Q. That was sent in addition to the amount you had to send in on the basis of your monthly report?

A. Yes.

Q. Now, you stated there wasn't anything on the second floor besides your upstairs storage room, is that correct?

A. Well, the store had part of the second floor, and there was——

Q. What else was on that second floor?

A. There was store rooms, a drapery room, drapery workshop [191] rooms.

Q. Where was the drapery workshop room?

A. Well, that was right along side of this storage room on the second floor.

Q. Had you ever read this policy over prior to the fire? A. No.

Q. Had you relied only upon Mr. Orkney?

A. Yes.

Q. Mr. Orkney was the agent of the Home Insurance Company? A. Yes.

(Testimony of Meryl Kirkevold.)

Q. Now, you testified there was nothing in the doorway to this storage room. What about this door between the sales' room *and it* went back to the work room?

A. Well, drapes hung across the door.

Q. That was closed off by drapes?

A. Yes.

Q. The door to the stairs, what was in that door?

A. That was a door that was kept locked.

Q. That was kept locked? A. Yes.

Mr. Hutcheson: Just so the record is clear, that refers to the rear door—the rear stairs in the upper corner of the——

Mr. Velikanje: That went on to the stairway, yes. [192]

Mr. Hutcheson: There are two stairs there. I think the record should be clear.

Mr. Velikanje: Well, it went to what we all term the back stairs.

Q. You say that was kept locked. That was kept locked at night? A. Yes.

Q. In the daytime you used it to go back and forth between your two store rooms and your cleaning room? A. Yes.

Q. When were these fur racks downstairs built?

A. Well, in '43 our business so increased that we had to have the room.

Q. Had you prior to that time been bothered by coats piling up on you and anything prior to storage? A. No.

(Testimony of Meryl Kirkevold.)

Q. You had not had that problem?

A. No.

Q. Did you in '43 also build in or put in these movable racks that you had in there?

A. Yes.

Q. And then your examination, or testifying in Mr. Hutcheson's cross examination, you did not mention anything about those racks. When were those put in there? [193]

A. Those were put in there in '43. We got all of the racks we could get at that time. We needed the hanging space.

Q. Prior to that time this was not used as a store room? A. No.

Q. Did the Barnes-Woodin Company use any of that space that is now your mezzanine store room for storage of things prior to 1943?

A. Well, along the catwalk—they kept the catwalk for themselves to get back to a room along the side of the building.

Q. But you built that partition up along the catwalk in '43? A. Yes.

Q. But, I mean up to the time that you built that partition, did they use any of this space between the time—

A. Yes, there was all kinds of display things they used in windows, little tiny racks for hanging blouses on, and things in the windows, and forms were all back in and around there.

Q. Up to when?

(Testimony of Meryl Kirkevold.)

A. Up until the time we were—we had to have the space for hanging.

Q. That was in '43? [194] A. Yes.

Q. Then at the time, this application was made out that Mr. Hutcheson has referred to, the Barnes-Woodin Company was using this as a storage space for theirs, is that right? A. Yes.

Q. Did you testify that the handwriting except for the signature on that application, is Mr. Orkney's? A. Well,—

Q. Is that in your handwriting?

A. No, that is not in my handwriting.

Q. Do you believe it is in Mr. Orkney's?

A. I would say it was.

Q. He handled all of your insurance?

A. Yes.

Q. Mr. Kirkevold, let us say that a coat was brought in for repairs, and a woman would not come back to get her coat for a month after you repaired it. Where would that coat be stored?

A. I would put it right in the back, in the storage room.

Q. In the store room? A. Yes.

Q. It would not be taken to the second floor, is that correct? [195] A. No.

Mr. Velikanje: I believe you say you want this one separate.

Mr. Hutcheson: Yes. There is one I want to object to its materiality, yes.

Mr. Velikanje: Mark these.

The Court: Mark them as an Exhibit.

(Testimony of Meryl Kirkevold.)

The Clerk: Plaintiff's identification 9.

The Court: You are not offering that one.

Mr. Velikanje: I will offer that one, yes, but Mr. Hutcheson will want to object to that one.

The Court: I see.

Mr. Hutcheson: I have no objection to 9.

Q. Mr. Kirkevold, I hand you a group of pictures marked Exhibit 9 for identification, consisting of 10 pictures. Are those pictures taken at the scene of the fire? A. Yes, they are.

Mr. Velikanje: I wonder, Your Honor, if we can mark these on the back "A," "B," and "C" on the separate pictures, in showing them on the map?

The Court: I was just thinking of saving time, if they were all pictures taken there, and that is the reason I suggested they be put in, since this is being tried to the Court without a jury, as a [196] group exhibit, and I do not want to take too much time in developing various features of them. If there is some particular feature you desire to point out. How are you designating them, plaintiff's exhibit, "A," "B," and "C"?

The Clerk: I will mark this 9-A for the purpose of——

The Court: Yes.

Q. Mr. Kirkevold, in picture 9-A, which direction would that picture be taken, to shorten it up. I don't think there is any argument but that is a picture taken in what you call the store room?

A. Yes.

(Testimony of Meryl Kirkevold.)

Q. On that picture shows a table in the middle of that space? A. Yes.

Q. What is that,—is that the place where that table was normally?

A. No, it has been put up there to take things off the floor.

Q. You had no table arrangement in that place?

A. No.

Q. What would be in that space?

A. Racks.

Q. There were racks? [197]

A. We had those racks removed at the time the picture was taken.

Q. You don't know how long after the fire the picture was taken? A. No, not exactly.

Q. But some of the cleaning up had been done in that—— A. Yes.

Q. I hand you 9-B, showing some dummies in the middle of the picture. Were those dummies normally in that position? A. No.

Q. Where would they be?

A. They would be over in this portion of the work room.

Q. In your work room? A. Yes.

Q. And that shows the partition you built along the balcony in 1943? A. Yes.

Q. 9-C, is that a picture looking along the work room? A. Yes.

Q. And those were the coats that were being worked on that you referred to, a rack being worked on? A. Yes.

Q. These would be the sewing machines?

(Testimony of Meryl Kirkevold.)

A. Yes. [198]

Q. Handing you 9-D, where would that be taken from?

A. Oh, that is the picture that you just showed me, only it is from the other end. I mean, it is the other end of the room.

Q. You mean, this would be in your storage room? A. No.

Q. That is a picture of the work room?

A. Work room.

Mr. Velikanje: I offer those in evidence. You have no objection?

Mr. Hutcheson: No.

The Court: They will be admitted.

(Whereupon, pictures referred to were then received in evidence and marked Plaintiff's Exhibit No. 9.)

Q. Handing you identification 10, what is that?

A. These are coats that the firemen took out and threw on the stairs after the fire, or during the fire.

Q. Is that one reason why you are unable to determine what coats were where, and how many were in the work room, and how many were in the store room? A. Yes.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: Objected to as immaterial.

The Court: Objection will be overruled. [199]

(Whereupon, picture referred to was then received in evidence and marked Plaintiff's Exhibit No. 10.)

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: I believe that is all.

The Court: Let me ask you a question or two, Mr. Kirkevold. You say you were in the fur business prior to establishing yourself at this place.

The Witness: Yes.

The Court: And was your business somewhat similar to the business you conducted after you went into this Barnes-Woodin Store?

The Witness: You mean the size of the business, or——

The Court: No, not the size of the business. The type of business and character.

The Witness: Yes, the same type of business, yes.

The Court: And you received from the general public their furs?

The Witness: Yes.

The Court: To process them and then stored them and made a charge for the service?

The Witness: Yes.

The Court: And you carried insurance protection at that time, too? [200]

The Witness: As far as I knew, yes.

The Court: Well, did you have a policy?

The Witness: I had it with the same man.

The Court: And then, when you changed your location and went to the Barnes-Woodin Store, did the representative of the insurance company come up there and see the situation as you had it?

The Witness: I don't recall whether an agent

(Testimony of Meryl Kirkevold.)

from the—I mean a representative from the company came. Mr. Orkney——

The Court: Mr. Orkney?

The Witness: Oh yes, he was up there quite often.

The Court: Well, he was the agent of the company, so far as you knew?

The Witness: Oh yes.

The Court: And when you made the change from '42 to '43, was he up there at any time?

The Witness: He was in there quite often.

The Court: What would he come up there for?

The Witness: Just come up there and see us and look around, and go again.

The Court: Did he ever come up and collect any premiums from you? [201]

The Witness: No, as a rule we mailed those.

The Court: To him or to the company?

The Witness: To him.

The Court: Did he discuss with you this change that you were making?

The Witness: He saw the changes that we were making and had seen the coats and everything.

The Court: Did you have any discussion with him concerning that?

The Witness: No, just went on as if it were all right.

The Court: Before you found difficulties with the shortage of labor, and before you made these changes whereby you placed the customers' coats

(Testimony of Meryl Kirkevold.)

in this room, how long did it take you ordinarily to process a coat and put it in permanent storage?

The Witness: On the average, it would probably average a month. We were always about a month behind, something like that.

The Court: Well, after you had this room built and put the racks in these, were you able to expedite your processing steps, or——

The Witness: You mean, speed it up?

The Court: Yes.

The Witness: Not at that time. It was a [202] question of labor.

The Court: Well, how long was it taking you at that time?

The Witness: Oh——

The Court: From the time the customers' coat came to you and the time——

The Witness: Well, coats varied, depending on the amount of work to be done on the coat.

The Court: Well, how great a variation was that?

The Witness: Well, one coat could be from three days to a month and a half.

The Court: That is on the alterations?

The Witness: Yes, the coat could vary that much.

The Court: But, from the time the customer brought it until when you consider it went to the final storage?

The Witness: Well, I can't say definitely on any one coat, because maybe some coats were a little

(Testimony of Meryl Kirkevold.)

job, if that was all there was to do on it, and waiting for one processing of a coat ahead of it, that coat would probably get out of there sooner than a coat that came in just previous to that one.

The Court: I don't believe you understand. [203] I don't know whether you understand my question or not. Mrs. A. brought you a coat to have all the things done to it that needed to be done to a coat of that grade and standard, and then store it for the summer season. About how long on the average would those steps require?

The Witness: I don't know whether I still get you or not, but—because it just depends on what we had to do to the coat, for the length of time until it got into storage.

The Court: How long would it be in this temporary place, then?

The Witness: At least a month.

The Court: And how much more than a month—you say at least a month?

The Witness: Well, it might run a week over. It might run two days over. I just can't—

The Court: Before you built this place, where were those coats?

The Witness: Well, we didn't have the number, and they were hanging on little racks out here in this work room,—right in the work room.

The Court: Did you ever discuss with Mr. Orkney the changes that you were making there, and the reason for the change? [204]

(Testimony of Meryl Kirkevold.)

The Witness: Yes, he knew that we were building that place to hang the coats.

The Court: You say you discussed it with him?

The Witness: Yes.

The Court: And anything said about your policy covering or not covering such——

The Witness: No, I never discussed that with him.

The Court: Well, did he say anything to you?

The Witness: No.

The Court: When did you begin to pay premiums on these coats?

The Witness: Well, at the end of each—it is a reporting policy, and we followed the same procedure and sent our reports in.

The Court: As soon as they came in to you, did you list them subject to premium—fire insurance premium.

The Witness: At the end of the month.

The Court: At the end of the month?

The Witness: Yes, we go through and get our valuations and send them in.

The Court: You mean that you kept the coat there for a month before you paid any premium [205] on it at all?

The Witness: Well, I don't know how soon the premium was paid, but it was one of those monthly reporting policies where the——

The Court: Well, did it date back, that the coat came in?

The Witness: Well, it would.

(Testimony of Meryl Kirkevold.)

The Court: How?

The Witness: I don't know just how they figure that for insurance purposes, but a coat could be, before it was reported, could be in there—it could be in there a month or 30 days.

The Court: Well, but did your receipts that you gave the customers, a copy of which you kept, was that dated as the date when the coat came in?

The Witness: Oh yes.

The Court: Well, did that go to the company?

The Witness: Not the day it came in.

The Court: But it went with the date?

The Witness: No, there was no date under which we would make——

The Court: Then, you never paid any premium—insurance premium on this policy on the coats until the end of each month? [206]

The Witness: Yes.

The Court: You did not pay for anything that was in there, even though it came in a month before?

The Witness: Oh yes, you just take the total each month.

The Court: That is what I am trying to get clear, you take it from the day it came in—you made a monthly report?

The Witness: Yes.

The Court: And some items on that were 30 days old, some were 10 days?

The Witness: Yes.

The Court: Some were 5 days?

The Witness: Yes.

(Testimony of Meryl Kirkevold.)

The Court: Now, did you pay a premium on it based upon the age of the item itself, for the time it was with you, or who calculated that premium?

The Witness: Well, I don't know. I don't know just how they work it. But I just take the total valuation that was in the store, and that would be sent in each month, and the next month you would take the total and send it in, and if it was increased any—if it decreased, you [207] wouldn't pay as much.

The Court: I think that is all I wanted to ask along that line.

Mr. Velikanje: Mr. Kirkevold, along that line, if you had a coat come in on the 25th of the month.

The Witness: Yes.

Mr. Velikanje: That would be included in your monthly report at the end?

The Witness: At the end of the month.

Mr. Velikanje: Given on the basis of the whole month?

The Witness: Yes, sir.

Mr. Velikanje: In other words, for your whole month's amount you took what you had on hand at the end of that month?

The Witness: Yes, sir.

Mr. Velikanje: Irrespective of whether you had a little in the beginning and a lot in the end, or a lot in the beginning and a little in the end.

The Witness: Yes.

Mr. Velikanje: Once a month you made a report

(Testimony of Meryl Kirkevold.)

of everything you had on hand at that date, is that correct? [208]

The Witness: Yes.

Mr. Velikanje: Does that answer Your Honor?

The Court: Yes.

Recross Examination

By Mr. Hutcheson:

Q. This was the first policy that you had with the Home Insurance Company, wasn't it, issued in August, 1942? A. As far as I know.

Q. In other words, if Mr. Orkney has issued a former policy, it was in some other company wasn't it, before that? A. Well, yes, I imagine.

Q. Now, do I understand you to say that the Barnes-Woodin Store as distinguished from your fur department had things on the mezzanine floor in 1942? A. Yes.

Q. Was that at the catwalk there or whereabouts was that?

A. Along the catwalk and along in the back.

Q. What kind of things did they have there?

A. Well, display fixtures and glass, and——

Q. They didn't take up very much room, did they?

A. I don't know how much they took up, but it was all [209] kind of piled in there, probably a lot of old stuff that they had.

Q. It was fixtures, rather than merchandise?

A. Oh yes.

Q. Now, as I understand, right from March,

(Testimony of Meryl Kirkevold.)

1942 when you first went in there, you always had the problem of what to do with the fur coats that were waiting to be repaired and worked on, didn't you? You had to keep them somewhere, didn't you?

A. We always had to hang them someplace.

Q. In other words, in 1942 you could not go to work and repair a coat as soon as it was brought in, could you?

A. We had lots of—we had lots of help at that time, and our business was very small.

Q. Well, just answer the question. At that time you did not prepare a coat as soon as it came in, did you,—repair a coat as soon as it came in?

A. No.

Q. And at that time you used the same method, didn't you, of hanging it out in this room here on the mezzanine floor until you got around to working on that coat in its regular order, that is right, isn't it?

A. Yes.

Mr. Hutcheson: That is all [210]

Redirect Examination

By Mr. Velikanje:

Q. Mr. Kirkevold, however, you stated in 1942, you stated you did not have business——

Mr. Hutcheson: I object to that as leading and suggestive. Counsel is testifying.

Mr. Velikanje: The counsel had his answer the question "yes" or "no," and I think he has a right to qualify——

(Testimony of Meryl Kirkevold.)

The Court: I think he answered and qualified his answer. He said he had plenty of help and had a small business.

Mr. Velikanje: That is all.

(Witness Excused.)

EARL KIRKEVOLD,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is Earl Kirkevold?

A. Yes, it is.

Q. You are a brother of Meryl? A. Yes.

Q. Earl, were you in business with your brother in 1943? A. Yes, I was.

Q. For what period of time?

A. I believe it was approximately May to December 1st.

Q. Then, where did you go?

A. I went in the army.

Q. And when did you get out of the army?

A. December 1st, of 1945.

Q. And are you back in the business with your brother again, now? A. Yes, I am.

Q. What experience have you had in furs?

A. I apprenticed in the fur business in 1926.

Q. In other words, you have been in the business for 20 years? [212] A. Yes.

(Testimony of Earl Kirkevold.)

Q. Have you been doing that solely and exclusively? A. Solely.

Q. Where has your business experience been?

A. With leading furriers in Seattle, with the William T. Nott Company, in their stores.

Q. During this whole period of time, except for your period in the army? A. That is right.

Q. Are you familiar with fur prices?

A. Yes, sir.

Q. Did you hear the testimony yesterday of your brother as to the values of those coats?

A. Yes, I did.

Q. Have you gone over the proof of loss and are you acquainted with those coats?

A. Yes, sir.

Q. Do you feel that the value he placed on those coats is a fair and reasonable value?

A. I do. I believe that in most cases, or in lots of cases, I should say, they were undervalued.

Q. That the value he placed on them is undervalued? A. Yes.

Q. Were you there in the Barnes-Woodin and Company when these changes were made in the mezzanine floor? [213] A. In '43, Yes.

Q. About when in '43 were they made?

A. It was during the course of our storage season in the summer.

Q. What changes were made?

A. The change was made in the remodeling the back end of the space in question, into a storage room.

(Testimony of Earl Kirkevold.)

Q. Had it been used as a storage room prior to that time? A. Not to my knowledge.

Q. Well, was it used as a store room when you came into the business? A. No.

Mr. Hutcheson: That is objected to as leading and suggestive.

Mr. Velikanje: Oh, I don't think so.

Q. What was the use of it when you came to the store?

A. As I recall it, there was window display fixtures—oh, display merchandise, I should say, stored there—fixtures to display merchandise for window and——

Q. Did they belong to Kirkevold?

A. No, that was Barnes-Woodin.

Q. Do you know Mr. Jim Orkney?

A. Yes, I do.

Q. Did you ever see him around the business?

A. Well, when I was there he used to come in about once a [214] month.

Q. About once a month?

A. Approximately.

Q. Would he look over the set up?

A. Yes.

Q. Did he ever discuss with you, or to your knowledge with Meryl, as to this insurance policy?

A. No, he never discussed it with me, or to my knowledge with Meryl.

Q. Did he ever see you while you were constructing this back fur storage space?

A. I believe he did.

(Testimony of Earl Kirkevold.)

The Court: You are speaking now of Mr. Orkney?

Mr. Velikanje: Mr. Orkney, yes.

Q. Since 1943, what has been the use and purpose of this space, marked here as "store room?"

A. Since 1943?

Q. Yes. A. Storage.

Q. Has——

Mr. Hutcheson: Well, if the Court please, that is objected to. This man was in the army the entire period, and during a long time——

Mr. Velikanje: We will say during the [215] period you were there. A. Storage.

Q. Did you ever see it used for anything else?

A. No, it didn't have room for anything else except for storage—we needed the space for storage.

Q. Was anybody walking through there to any other place? A. No.

Q. You were not there at the time of the fire?

A. No, I was not.

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. As your brother testified, the only change made there was putting in a partition on the mezzanine, and putting in some additional racks, that is correct, isn't it? A. Yes.

Q. By the way, these racks were moveable,

(Testimony of Earl Kirkevold.)

weren't they—that is, they were on wheels or casters?

A. I believe that two of them were moveable, and two of them were permanent fixtures.

Q. Just when were those things done?

A. Well, I can't give you the exact date. It was during the summer—the early part of the storage season when I first came. [216]

Q. Of what year? A. '43.

Q. Did you see yourself, any of these coats that were destroyed or damaged in the fire? You did not, did you?

A. Yes, I did. I got an emergency furlough after the fire.

Q. After the fire?

A. I was home one day.

Q. How long after the fire were you here?

A. It was about—I can't give you the exact date, but I imagine it was within 10 days or a week.

Q. You were not here before the fire?

A. Oh, no.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. You state there was only the building of the racks and the building of the partition. Was the Barnes-Woodin display equipment moved out at that time, too? A. Yes.

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all.

(Witness excused.) [217]

E. C. FLEMMING,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

Q. What is your name?

A. Flemming—E. C. Flemming.

Q. Where are you employed?

A. Barnes-Woodin Company.

Q. How long have you been with Barnes-Woodin Company? A. A little over 31 years.

Q. In what capacity?

A. Well, I was Vice-President and Manager under the old regime, and operating manager of it under C. C. Anderson and Company.

Q. Are you familiar with the Kirkevold Fur set up at the time of the fire in May, '44?

A. Yes, sir.

Q. And previous to that time? A. Yes.

Q. At the time of the fire, referring to Exhibit 5, what purpose was this space marked "store room" used for?

A. That is the space back of the show room?

Q. Yes. [218]

A. That was used for storage, for storing fur coats that came in, and as I understand it these coats were put there waiting to be processed and taken up in their second floor, into the storage room.

(Testimony of E. C. Flemming.)

Q. Do you know how long those coats would be stored there? A. No, I haven't any idea.

Q. Were you into that space, or looked into that space, once-in-awhile? A. Oh, yes.

Q. In your operations, how long had that been used for that purpose?

A. Do you mean this—back storage room?

Q. Yes.

A. Of course, I can't remember the date, but I would judge at least a couple of years.

Q. Was it used that way all the time that Kirkevolds were there?

A. Well, I don't remember that exactly. Of course, there were several changes, but I don't remember whether it was used for storage all the time or not. I think it was.

Q. Did the Barnes-Woodin Company store some of their things there awhile?

A. Going along the windows—going along the west side of the store was—about 6 feet up there was what we call the catwalk that was used for storing displays and [219] manikins. To go into that, you have to go along the Fur Department, alongside of the front edge of the balcony, and we kept in that catwalk all our fixtures, and of course there had to be access through the Fur Department at that time to get in, and along the wall there was—we used to store garments that were going into the windows that were put up on a rack, and finally we put just—well, it was just fixtures like tea stands and some manikins, and so forth. That was used for storage

(Testimony of E. C. Flemming.)

along that rack. They did not use it when Kirkevold was first there.

Q. After they had been there awhile, was a change made?

A. Yes, there was. There was a dispute arose, and they built racks and I think they were substantial racks, as I remember it, along that whole place, from the edge of the stairway wall clear back.

Q. Then, that space, that was partitioned back, was no longer used by the Barnes-Woodin Company for the——

A. No, our equipment then was all moved upstairs.

Q. That was the change made at that time?

A. We couldn't use that because to do that we had to go right through the main Fur Department, so we took it all upstairs.

Q. So anyone desiring to get across this catwalk would use [220] this runway along the balcony which was partitioned, and separate from the Fur Department?

A. It was separate, because the wall of the stairway came out quite aways, and to go through, you had to go along—then, he put the partition in and that blocked that all off and we put everything off and put them up on the second floor, all the fixtures.

The Court: Did you have anything to do with leasing this space to Mr. Kirkevold?

A. No, Mr. Woodin handled that, entirely.

(Testimony of E. C. Flemming.)

Q. Were you familiar with it at all, as to what he paid as a rental?

A. Well, no I don't remember.

The Court: I probably should have asked that question from the Plaintiff himself as to whether there was a change made in the expansion of quarters, and increase of rental in '43, or '42, when he had more space.

The Witness: No, there was no increase. We did not make any increase, I know that.

Q. Mr. Kirkevold operated with Barnes-Woodin and Company on a percentage basis?

A. Yes. [221]

Q. So, it is not a rental basis?

Mr. Flemming, has the cause of the fire ever been determined? A. No.

Q. There is no known cause of the fire?

A. No known cause. I don't think the firemen ever rendered a verdict either, on that.

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. There was no change made in the percentage basis—that part Mr. Kirkevold operated, by reason of these changes in 1943?

A. No, only a percentage basis.

Q. When you say on a percentage basis, do the receipts of the business go to your company and then a percentage of those to Mr. Kirkevold or is it the other way around?

(Testimony of E. C. Flemming.)

A. In other words, if he sells ten dollars' worth, we get say fifteen per cent—we get a dollar and a half.

Q. He pays you a certain percentage?

A. Yes.

Q. You say there was no change made?

A. No, the percentage remains the same. The more business he did, the better off we were. [222]

Q. When did your company, the Barnes-Woodin Company, sell out to C. C. Anderson, of Boise, and the new company took possession—when was it, May 1st?

A. May 1st, 1944.

Q. About 9 days before the fire?

A. That is correct.

Q. Mr. Flemming, your company gave financial assistance in some manner, did you not, in connection with the settlement of the fur owners?

A. Are you speaking about the new company, or the old company?

Q. Either one, but I assume it would be the new company.

A. I don't know about the new company, but I know any time they needed any assistance, I know the old Barnes-Woodin Company did. I don't recall that they needed it.

Q. Do you know yourself whether either company gave financial assistance in connection with the settlement of the fur coat customers after the fire?

A. I don't know anything about that.

Q. In other words, your position is operations manager of the store?

A. That is right.

(Testimony of E. C. Flemming.)

Q. Do you remember approximately when this partition was put in and the changes made?

A. No, I haven't any idea. I know it was sometime after Kirkevolds took over. Previously, we always used that [223] catwalk and that corridor. We used that as a storage room—that is, for fixtures.

Q. As a matter of fact, so far as the use of the space on the mezzanine was concerned, Mr. Kirkevold proceeded just about the same after the partition was put in as before?

A. He had more space and he had more storage room.

Q. He had more space? A. Well, sure.

Q. Well, did you—your company use as much of the space before the partition was put in, the space in here which is called “store room” on this map (indicating)?

A. Well, let me get the idea. I have not seen this map before.

Q. In other words, the back stairs are here (indicating).

A. Here is the runway here, is that right?

Q. Yes, this is the front of the mezzanine.

The Court: You have to speak a little louder.

Q. And you notice where it is written here “store room,” before the partition was put in in 1943 or whenever it was, Mr. Kirkevold used that space, most of it, at that time?

A. No, you are mistaken.

Q. Didn't he?

A. No, he did not. He did not use from this part

(Testimony of E. C. Flemming.)

over here [224] at all (indicating), because it was used as a runway, and as a storage for fixtures, and there would have been no place to put racks. He could have walked up and down there on the floor, but he could not use it as a business part.

Q. How wide a space did the Barnes-Woodin Company in the Fur Department use on the mezzanine, before the partition?

A. I would say that runway is about—probably 5 or 6 feet wide,—the full length from here (indicating) back.

Q. And before the partition was put in, the Barnes-Woodin Company used the space, about 5 or 6 feet wide?

A. They used the entire space here, and they had to use the runway across over into here, and naturally this was open. They had to use the runway. They had to have an access to this place over here. This Fur Department by Holmes & Benioff was originally over here, and they had loose racks here, and we had to keep a runway all the time, because these window men were using fixtures all the way through there.

Q. No use going back that far, but how wide a space was used by Barnes-Woodin Company in 1943?

A. I would say 5 or 6 feet wide and whatever length this is, and then the runway along here, that could be used. It had top racks. This was definitely used by the Barnes- [225] Woodin Company.

Q. And any fur coats in 1942, and up to the time

(Testimony of E. C. Flemming.)

the partition was put in that was waiting to be repaired or worked on there, were kept in that room on the mezzanine floor?

A. They were kept in part of the room on the mezzanine floor. They were kept in this section here (indicating).

Mr. Velikanje: You refer to the space here. Is that the space marked "work room?"

A. Yes, that is the work room right here. Here is the entrance. You see the racks, and here is racks.

Q. There never was at any time any partition, was there, or any physical objects separating what is referred to as the work room and what is referred to as the store room?

A. There wasn't here, but there was here (indicating). Of course, from the store room, this separated them.

Q. But other than what separated the show room or sales room and the work room, there was no partitions or separations of any kind, physically, between what is referred to here as a work room and a store room?

A. No, no, this store room actually stopped right here (indicating), when he first took it over. Later, of course, he took this over and partitioned it, and I am sure there was stationary racks in there.

Q. You say it actually stopped there. You don't mean there [226] was any wall or partition there?

A. Oh, no, there was no partition here, but this space was used by the Barnes-Woodin Company.

(Testimony of E. C. Flemming.)

Q. About 5 or 6 feet wide?

A. By about 12 or 14 feet, something like that. I don't know what the length of it is.

Q. And then, before the partition was put in, the same method was used, but after the work had been done on the fur coats, they were taken to the storage room up on the second floor?

A. As I understood it, yes.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. Mr. Flemming, Mr. Hutcheson said the Barnes-Woodin Company used only a space 5 or 6 feet wide. Was the rest used by Kirkevold?

A. None of that space was used by Kirkevold. This, I understand, is the wall going to the stairway between this, and this is the balcony front, is it?

Q. Yes.

A. There was none of that used from there, clear back to the windows here.

Q. Prior to the time they partitioned this off?

A. Yes.

Mr. Velikanje: That is all.

(Testimony of E. C. Flemming.)

Recross Examination

By Mr. Hutcheson:

Q. You say the space that was used by Barnes-Woodin Company was about 5 or 6 feet wide?

A. Whatever the length of this is. I would say 10 or 12.

The Court: About 5 or 6 feet wide, and 10 or 12 feet long?

A. Whatever the length of that partition is.

Mr. Hutcheson: That is all.

(Witness excused.) [228]

HAZEL FIEBELKORN,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is Hazel Fiebelkorn?

A. Yes, sir.

Q. Mrs.? A. Yes.

Q. Mrs. Fiebelkorn, where are you employed?

A. Barnes—well, with the Kirkevold Fur—Barnes-Woodin Company.

Q. In what capacity?

A. I work in the work room.

(Testimony of Hazel Fiebelkorn.)

Q. In the work room. How long have you been employed by them? A. About 3 years.

Q. Were you employed by Meryl Kirkevold in May of 1944? A. Yes.

Q. At the time of the fire? A. Yes.

Q. Were you working the day of the fire?

A. Yes.

Q. Mrs. Fiebelkorn, referring here to Exhibit 5—you might step down and look at this. That has been [229] identified as a drawing of the Kirkevold Fur Department in the Barnes-Woodin Company at the time of the fire. The part marked here “sales room,” and this is “work room,” and this marked a “store room,” now where did you work?

A. I would work right up in here most of the time. The machine was setting—was moved here more—back and forth, but it was more sitting right in here somewheres (indicating), and I worked from there, right around in here (indicating).

Q. You worked in the part marked as a “work room?” A. Yes.

Q. Were you in charge of the “work room?”

A. Yes.

Q. Who was in charge of the “work room?”

A. Mrs. Hawk.

Q. She is no longer around, is she?

A. No.

Q. Did you say you had worked for them 3 years? A. Yes.

Q. When did you come to work for them, do you remember?

(Testimony of Hazel Fiebelkorn.)

A. Well, it was about the last of November, I believe—the last of November.

Q. In '42 or '43? A. '42. [230]

Q. Were you there when they made these changes in the construction?

A. Some of them were made, but they made a few more after I was there.

Q. You don't remember just what was made there?

A. No, because I had not worked long enough, and I did not take much interest in it, you know. They were building.

Q. They were building at the time you came?

A. Well, in November when I came, they were pretty busy, but they fixed it when they were not quite so busy.

Q. Referring to the period after let's say November of 1943, what was this space marked "store room" used as?

A. Well, that was all store room. They just stored coats.

Q. Was it used for any other purpose?

A. No, just storage for coats, and the shelves in the back for our fur pieces that we used for repairs.

Q. That was small pieces? A. In boxes.

Q. Was there any work tables back there?

A. No.

Q. Was anybody walking through to get in any place else? A. No.

Q. Mrs. Fiebelkorn, at the time of the fire what

(Testimony of Hazel Fiebelkorn.)

percentage of the coats destroyed were in the work room, and what percentage were in the—what has been termed [231] store room? Approximately what per cent were in the work room?

A. Well, that would be hard to say, but it would be comparatively a small per cent.

Q. What, 5, 10, 15, 20, 25—what per cent?

A. I would say 20 or 25.

Q. Twenty or twenty-five per cent of the coats destroyed? A. Yes, sir.

Q. Were in this portion marked work room?

A. Yes, I imagine.

Q. After a coat was brought in—let's say for repairs or for storage, where was it placed when it originally came into the shop?

A. When it first came in?

Q. Yes.

A. It was put back where it is marked "storage room."

Q. How long would it remain there?

A. Well—I am figuring as of the time—about the time of the fire. Well, it would be about a month.

Q. About a month? A. More or less.

Q. And then what would be done with it?

A. Well, it would probably be worked on, or whatever had to be done to it, and finished up, and put in storage.

Q. And put in storage where? [232]

A. On the second floor.

Q. Let us say that a coat was brought in, not

(Testimony of Hazel Fiebelkorn.)

for permanent—not summer storage, but for repair, state what would be done with that coat?

A. It would probably be hung back there in the work room until we were notified as to what she wanted to do, come in and get it or for storage. It would probably hang there until they showed us about it.

Q. Hang where?

A. Back in the storage room.

Q. Back in the storage room here (indicating)?

A. Yes.

Q. Were coats ever taken directly up to the upstairs storage, pending the time of repairs and cleaning?

A. You mean, when they were brought in, taken right up to storage?

Q. Yes. A. No.

Q. Was that back space, or that back storage space full most of the time? A. Yes.

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson: [233]

Q. When did you say that you first went to work there, Mrs. Fiebelkorn?

A. I don't remember the exact date, but it was in the last part of November '42.

Q. And you have worked there continuously since that time? A. Yes.

Q. And you are employed there at the present time? A. Yes.

(Testimony of Hazel Fiebelkorn.)

Q. You have worked in the work room during all that period? A. Yes.

Q. Well, where is Mrs. Hawk, now, do you know? A. I don't know.

Q. When you first went to work there, in November of 1942, had the partition that has been referred to here this morning been put in yet?

A. Well, I can't remember that for sure, because I was new and I was given a table to work at, you know, and I did not move around much, but I know that the next spring they did do a lot of work there, changing things around and put in racks.

Q. What changes if any were made there after November, 1942, and during 1943?

A. Well, they did work on that wall. Now, just for sure, you know, to say right off, I wouldn't know because I don't know for sure what was there before, and they put in [234] new racks and got it for storage. They were using it all for storage.

Q. They put in additional racks there?

A. Yes.

Q. When you first went there, coats were being stored, weren't they—or I won't use the word "stored"—they were being kept for the time being, weren't they, in this part here where it says "store room"?

A. I don't know for sure about that. I don't know where they got the coats, because I sat over in the other corner, and I was given something to do, and I did that, and I didn't do much—

(Testimony of Hazel Fiebelkorn.)

Q. Well, you worked there every day, didn't you, all of that time?

A. Yes, but what I mean, I am not sure how they had that fixed back there—how that was.

Q. How many hours a day did you work in that room? A. That would be about 7 hours.

Q. And you worked right along continuously every working day, practically from November, 1942, to the present time, except vacations?

A. Yes, sir.

Q. Well, where would you go to get a coat to do repair work on it when you first went there?

A. Well, I didn't—I didn't go and get it. That is what [235] I was saying, I would ask somebody what I was supposed to do next, and they generally give me a coat to do. When I first went there I knew nothing of the business, and they would give me and tell me what to do, and I hardly ever moved away from my table, excepting to go out and in.

Q. After a day or two, you became quite familiar with the surroundings, didn't you?

A. Yes, the part I was working in.

Q. About how long was that room you were working in, would you estimate it?

A. I am not very good about estimating. I couldn't say how wide that is.

Q. Was it a large room, or small room, would you say?

A. Well, it seems quite small with everything in there, and everything, but as to actual feet, I wouldn't say.

(Testimony of Hazel Fiebelkorn.)

Q. When you first went to work in what seemed to you as a small room, was there any small partition here, near the—you understand this is the front of the mezzanine balcony here, at the lower side of this diagram—was there any partition there when you first went to work?

A. I wouldn't remember for sure.

Q. You don't remember?

A. No, I wouldn't say.

Q. Whether there was any partition built there after [236] November, 1942, you don't remember?

A. I think it was the next spring they were working on it, but I couldn't say for sure whether that was all wall, whether they fixed that in, because I didn't do much around there until the next spring, and then I helped with the storage and things, and then I do know that was all partitioned up then. Before that I didn't have much business back in there and I couldn't say for sure.

Q. The general method of conducting the business remained the same, didn't it, when you first went there before the partition was put in, as well as up until the time of the fire; namely, that fur coats of customers that were brought in there, were hung in racks somewhere in that room and were ready to work on them and then you worked on them, is that right?

A. They were, yes, they were always hung up.

Q. And hung up in that room on the mezzanine floor?

A. Yes, somewhere in there.

Q. And then after you finished, the method re-

(Testimony of Hazel Fiebelkorn.)

remained the same when you first went there, and right up until the time of the fire, when the work was finished they were taken into the storage room upstairs on the second floor? A. I imagine.

Q. Well, you know, don't you?

A. Well, there is a lot to do but I did ripping and things [237] like that at first; and I didn't have anything to do with the storage. Someone else took care of all that, but I imagine it was the same.

Q. To the best of your knowledge, it remained the same? A. Yes.

Q. After you finished working on a coat, it was taken in storage upstairs, wasn't it?

A. I imagine, because that is the way we have still been doing it.

Q. And in your work there, you used that expression, didn't you, when it was taken upstairs you called it "put into storage"?

A. We have what we call a finishing rack, and when we were through with it, we hung it up there, and someone else took it from there and took it to storage, I imagine.

Q. Took it to storage, and then it was taken to the second floor upstairs, is that right?

A. I imagine.

Q. Well, to the best of your knowledge.

A. Yes.

Mr. Hutcheson: That is all—pardon, one question.

Q. Would you step down to look at the diagram

(Testimony of Hazel Fiebelkorn.)

a moment? I believe I forgot to ask Mr. Kirkevold this, but at all times there was a door to the stairs in the upper left [238] hand corner of this diagram, wasn't there? A. Yes.

Q. There was a stairway there that went down to the west side of the building on North Third Street, and also the way upstairs?

A. Yes, sir.

Q. And just where was that door there? Was it at the point that is marked there—is that where the door was? A. Well, yes.

Q. Of course, according to that, it is marked right square in the corner.

A. I couldn't remember for sure—I remember opening that door. It went back against the wall.

Q. So, you would——

A. I would say that is about right.

Q. That is located correctly there, and that door was there when you first went there, wasn't it?

A. Yes.

Q. And remained there until the fire?

A. Yes, I am sure it was.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. Mrs. Fiebelkorn, to refresh your recollection, at the time you came to work for Kirkevold, didn't they have a [239] high rack in the work room where you had to walk under the coats when the coats were waiting to be repaired, do you remember? A. You mean——

(Testimony of Hazel Fiebelkorn.)

Q. Along the—in the work room, along this inner wall? A. Oh, yes.

Q. Is that where they were kept when you first came, do you remember?

A. Well, I don't remember for sure. Like I said, I would ask somebody and they would get me something to work on, but there was a rack there.

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all.

(Witness excused.)

The Court: I think we will take a morning intermission, now. We will recess for 15 minutes.

(Recess.) [240]

BERNICE STEVENS,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

The Clerk: Your name, please.

The Witness: Bernice Stevens.

Q. Your name is Bernice Stevens?

A. Yes, sir.

Q. Mrs. Stevens, where are you employed?

A. I am employed at the Kirkevold Fur Department.

(Testimony of Bernice Stevens.)

Q. In the Barnes-Woodin Fur Department?

A. Yes.

Q. How long have you been with them?

A. Since the first part of April, '43.

Q. April, 1943? A. Yes, sir.

Q. In what capacity are you employed by them?

A. Saleslady in the sales room.

Q. You are in charge of the sales room?

A. Yes.

Q. Did you have such position in May, 1944?

A. Yes, sir.

Q. Mrs. Stevens, referring to Exhibit 5, which is a [208] drawing of the location of the Kirkevoid Furs at the time of the fire, where was your place in that organization—where was your location?

A. On the mezzanine floor, at the top of the front stairs.

Q. Would that be in this space marked "sales room"? A. Yes.

Q. What duties did you have relative to coats that came in for repair or for storage?

A. I received the coats and gave them their necessary receipts.

Q. And then what did you do with the coat?

A. I hung it on the work rack, just through the curtains.

Q. It was back in this——

A. I would hang it through the curtains on the racks.

Q. Then, would your interest in that coat cease?

A. Yes, I had nothing else to do with it.

(Testimony of Bernice Stevens.)

Q. You had nothing else to do with it?

A. -No.

Q. You were familiar with the shop, however?

A. Yes, sir.

Q. What purpose was the space marked "store room" on this map used for, during all the period you were there? A. For storing coats.

Q. Was it used for any other purpose?

A. Sometimes we would have new coats hanging on there. [242] I would frequently hang new pieces on there when I had surpluses.

Q. You mean those would be coats that were owned by the store?

A. Yes, if I had too many in my sales room.

Q. Used them as—just for storage, for that purpose? A. Yes.

Q. Do you know what percentage of coats and furs were in the work room, and what per cent in the spare room in back? A. I wouldn't know.

Q. You have no information?

A. I have no information as to that.

Q. I show you an Exhibit 9-C is that a picture that was taken in the work room?

A. Yes, this is the work room. This is the partition.

Q. Are all of those coats that are evidenced in this picture, customers' coats?

A. I couldn't be sure.

Q. Or customers' pieces?

A. I couldn't be sure.

(Testimony of Bernice Stevens.)

Q. Well, did you have any of the store's coats and pieces hanging there at that time?

A. There would be, yes, very few, I think.

Q. There would be very few? A. Yes.

Q. But, you would have some in that space?

A. Yes.

Q. At the time you came to work for Kirkevolds, was the partition between the balcony and the catwalk or between the store space and the catwalk across the balcony? A. I think it was.

Q. You think it was? A. Uh-huh.

Q. And has this space been used for any other purpose since you have been in their organization, than for storage of furs? A. Just those.

Q. Just for storage of furs—

Mr. Velikanje: You may inquire—pardon me, just a moment.

Q. Are you familiar with coats—with fur coats?

A. Yes.

Q. Are you familiar with the processing of them before they are put into storage?

A. Yes.

Q. Are coats put directly into storage?

A. No.

Q. What is done to them?

A. They are inspected for various things, for loose buttons, loose linings, they would be re-tanned.

Q. Are those all things necessary, that are necessary before they are placed in storage upstairs? A. Yes.

Q. Do you know how long a coat would stay in

(Testimony of Bernice Stevens.)

the downstairs storage before it would be worked on? A. I don't know really.

Mr. Velikanje: That is all. You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. Referring to that as downstairs storage, as counsel has, by "downstairs", of course we mean the mezzanine. The coats were just kept there, weren't they, temporarily, until they could be worked on?

A. No, they were—I don't know how long they would be there after I put them through into the work room. I wouldn't know how long they would be there.

Q. Well, were they permanently stored there on the mezzanine floor?

A. They would be sometimes there a month or two.

Q. A month or two. Well, that would be just until they could be reached in their turn to have the repair work or whatever it was done on them, isn't that right?

A. I couldn't say for sure.

Q. You don't know as to that? [245]

A. No, I don't know.

Q. Your work primarily was in the selling of new coats?

A. Just in the selling of furs. I wasn't, in fact, in there much.

Q. The general practice was that after the work had been done on a coat in the work room, it was

(Testimony of Bernice Stevens.)

then taken and put in storage upstairs on the second floor, wasn't it?

A. That would be put in the vault upstairs.

Q. And that practice remained uniformly all of the time that you have worked there, hasn't it?

A. I suppose.

Q. To the best of your knowledge?

A. To the best of my knowledge.

Q. Do you know how it happened, Mrs. Stevens, that in some instances, the value was not put on the receipt that was issued there. Was that just a mistake that was sometimes made?

A. It was just an oversight, I imagine.

Q. An oversight? A. Uh-huh.

Q. Did you have anything to do yourself with issuing certificates where the customer wanted an insurance certificate?

A. Yes, I wrote the policy.

Q. And in some instances, I notice, the certificates and the [246] valuation on the receipts for the same coats were different amounts. How did that happen? Was that just an oversight also, or——

A. I don't understand.

Q. Well, in some instances where certificates were issued, the amount stated on the certificate differed from the value of the same coat stated on the receipt. Do you follow me? A. Yes.

Q. And I just—my question was just how did that happen? Was that——

A. I don't know how that happened.

(Testimony of Bernice Stevens.)

Q. Did you keep a record there of certificates that you issued?

A. Yes, there was a record. We had a copy and the company had a copy.

Q. If the certificate was issued before the coat was brought in, then did you make a practice of referring to the amount on the certificate when you came to fill in the receipt?

A. I don't remember whether I would refer to it or not. I would take their word for it, I think, what their valuation was.

Q. You would take the customer's word for it in issuing the receipt, what value they wanted to place on it? A. Yes. [247]

Q. Do you have any other explanation how that happened, different amounts were stated on the certificates and the receipt? A. No.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. Mrs. Stevens, wasn't it a practice to limit the amount on the receipts——

Mr. Hutcheson: I object to that as being leading and suggestive.

The Court: Let him finish his question.

Q. Wasn't it a practice to limit the amount on the receipt to two hundred dollars if the parties had a certificate? A. Yes.

Q. If you went to get a coat for a customer that had been brought in only for repair, not for permanent summer storage, where would that coat be?

(Testimony of Bernice Stevens.)

A. Well, it could be either on the repair rack or in the downstairs storage.

Q. Let's say the coat had been ready for a month.

A. It was in the downstairs storage.

Q. They were never taken to the upstairs storage? A. No. [248]

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all.

(Witness excused.)

JAMES MILNE

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Velikanje:

Q. Your name is James Milne?

A. That is right.

Q. Where are you employed?

A. I am managing director of Barnes-Woodin Company.

Q. How long have you been such?

A. Since we took the store over.

Q. On what date was that?

A. That was May 1st, '44.

Q. Were you in charge of the store at the time of the fire? A. Yes, I was.

(Testimony of James Milne.)

Q. Had you previous to the fire gone completely over this store? A. That is right. [249]

Q. Were you familiar with its operation?

A. I was familiar as I could be in the period of a week.

Q. Were you familiar with the Fur Department?

A. I had made an inspection of all the premises.

Q. During the period that you were there, it would be only a few days, would it not?

A. That is right. I left on Saturday of that week. I came over on Sunday, and was there a week and left on Saturday. I was in Lewiston, Idaho, at the time of the fire. I came back the next morning.

Q. Mr. Milne, in the short time that you were there, did you ever see this part marked "store room" used for any other purpose than the storing of furs?

A. No.

Q. Mr. Milne, did you assist Mr. Kirkevold in attempting to make adjustments of his insurance?

A. Well, Mr. Kirkevold came to me some time after—I would say it was probably 3 weeks to a month after the fire, and told me that there was apparently some trouble with his insurance, and asked me what I thought he should do. Prior to that time, I had talked to Mr. Sinclair, who was the adjuster on several occasions.

Q. Who did Mr. Sinclair represent himself to be?

A. He was the adjuster for the Home Insurance Company, as I understood. [250]

(Testimony of James Milne.)

Q. Did you have some other adjustments in your own losses in the store made with him?

A. Yes, he handled part of our loss, too.

Q. Did you ever discuss with Mr. Sinclair the loss on the Kirkevold furs?

A. I talked to Mr. Sinclair on several occasions.

Q. What were those conversations?

A. I don't remember that we ever—that I asked him definitely what the coverage was, because I had never had any intimation that the coverage was not full, and I recall talking to Mr. Sinclair regarding the card system that they had, and they brought these coats up off the mezzanine onto what was left of the beauty shop on the second floor, and they stored them up there—all of these damaged coats, and I recall very definitely one day I was back there and asked Mr. Sinclair how they were coming along in the adjustment, and he said they were trying to find which coat went with which certificate, and he also said at the time there were several certificates that they believed was destroyed in the fire. However, the main part of them seemed to be there.

Q. Did Mr. Sinclair advise you that they were not to pay this? A. No.

Q. Did you ever talk to Mr. McKinley?

A. Yes, I did. [251]

Q. Who is Mr. McKinley?

A. Mr. McKinley was another adjuster for the Home Insurance Company who took over when Mr. Sinclair left.

Q. What was your conversation with him?

(Testimony of James Milne.)

A. I called Mr. McKinley, due to the fact that Mr. Kirkevold had come to me and told me that he was having trouble with his adjustment, and I asked Mr. McKinley what the trouble was. Mr. McKinley stated that the company did not feel that the storage room on the mezzanine was a storage room—and do you want me to go into details?

Q. Yes, go ahead with your conversation.

A. I asked Mr. McKinley at the time,—I had gone over Mr. Kirkevold's policy with him, and as far as I could see, why, what little knowledge I had of it, it looked all right, and I asked Mr. McKinley what the difficulty was, and he said that this room on the second floor—or rather on the mezzanine, did not constitute a store room, and I recall the time I asked him what we were sitting in at that time, which was my office, and he said it was an office. I asked him what it would be if I took the desk and chairs and everything out and filled it with dresses, and he maintained it would still be an office, and that was about the gist of the conversation because I did not agree with him. [252]

Q. As a result of this adjustment or lack of adjustment, did you have considerable customers' complaints with the Barnes-Woodin Company?

A. We did have quite a few complaints.

Q. Over what period of time were they working on this adjustment?

Mr. Hutcheson: If the Court please, this is objected on as immaterial.

(Testimony of James Milne.)

The Court: I doubt whether it is. They did not make the——

Mr. Velikanje: You may inquire.

Cross Examination

By Mr. Hutcheson:

Q. Mr. Milne, your company did furnish financial assistance to Mr. Kirkevold in making a settlement with the fur customers?

A. We carried Mr. Kirkevold. Mr. Kirkevold's arrangement with us is that we pay all of Mr. Kirkevold's running bills—pay his invoices on coats. At the end of each month there is a settlement made at which time the deductions are made from the total sales figure, the percentage that we get is deducted, plus all of Mr. Kirkevold's expenses that we have paid for him. [253] Then, whatever balance there is on that, goes to Mr. Kirkevold. In other words, the balance that is left. Now, at the time—immediately after the fire, there was a period there that lasted, to the best of my recollection, from the time of the fire until about April of the next year, during which the sales on the merchandise, and the amount that was deducted was more than what Mr. Kirkevold had coming. In other words, he was showing a red figure on that, and we carried that red figure. There was no money paid directly but we carried that account. Do you see what I mean? We carried that account in the red, and to the best of my recollection it was either in March or April of the next year, before

(Testimony of James Milne.)

that account came out in the black, and Mr. Kirkevold received the money that he would naturally receive under current operations.

Q. Maybe you did not understand my question. I mean in making settlement that Mr. Kirkevold has made since the fire with the fur coat customers, did your company furnish financial assistance to him for that purpose?

A. No. Well, I think I just answered that question. I told you how the financial arrangement was.

Q. Oh, you say he was in the red?

A. That is right. There was a red figure which he did not [254] get any recompense for his month's earnings. We carried that red figure from month to month, up until about April, when it finally balanced out and he began to receive an income from it.

Q. And one of the principal reasons he went in the red during that period, was that he was paying out money to customers, making these settlements, is that right?

A. That is right. He did not have money to buy his stock to go back into business again.

Q. As a matter of fact, it was you and Mr. Velikanje that came to my partner's office, Mr. Cheney's office during his lifetime, and suggested that settlements be made with the fur coat customers, and these releases taken and so forth: that the matter be worked out in this general method.

A. I was in Mr. Cheney's office at one time regarding the payment of the policy, yes.

(Testimony of James Milne.)

Q. Well, what is the answer to my question, is it correct or not?

Mr. Velikanje: Well, I think——

A. I think the question was a little ambiguous to me, because I had no authority or anything else to make settlements for Kirkevold.

Q. Was Mr. Kirkevold present at that conference in [255] Mr. Cheney's office?

A. I do not think that he was, no.

Q. It was just you and Mr. Velikanje, and Mr. Cheney?

A. Yes, that is right. The reason I was over there that day, if that is the question, was due to the fact that——

Q. No, that is not the question as to why you went, but I am interested in what happened when you were there. Didn't you and Mr. Velikanje propose to Mr. Cheney at that time that to avoid a complicated interpleader suit brought by the insurance company, that you would go ahead and make settlements with the fur coat customers, and that a suit would be brought against the insurance company?

A. That is not as I recall it. As I recall it, there was an offer made of \$5,000 by the insurance company, and contingent on Mr. Kirkevold obtaining releases up to half of the amount of the loss, and I was over there at Mr. Cheney's request, and talked with him about it because we were naturally vitally interested in that being from a customer's standpoint.

(Testimony of James Milne.)

Q. Did Mr. Cheney request you to go over there?

A. Yes.

Q. Had you called him up on the phone previously?

A. I had never seen Mr. Cheney previously.

Q. Who made that suggestion or that proposal? Did it come [256] from you or Mr. Cheney?

A. It came from Mr. Cheney, as I recall it.

Q. Well, I am afraid his testimony is not available. Now, in this conversation with Mr. McKinley, you did not mean to testify, did you, that Mr. McKinley referred to this as a storage room on the mezzanine floor?

A. As I recall the conversation, Mr. McKinley told me that the company was only assuming a hundred thousand dollar coverage on the fur vault; that the store room on the second floor was not covered; that to the best of my recollection is exactly what he said.

Q. What did he call the room on the mezzanine floor?

A. As I say, I think he called it the store room, but I would not be positive of that now.

Q. You mean to say that Mr. McKinley said "Milne, that room is not a storage room?"

A. Mr. McKinley said that the store room on the second floor does not come under the limits of the policy as a storage room, as I recall it definitely, he stated it was because it didn't have a door across it.

Q. You don't mean the second floor, you mean the mezzanine?

(Testimony of James Milne.)

A. I mean the mezzanine, yes, sir.

Q. Did Mr. McKinley ever say that the second floor contained a fur storage room? [257]

A. I wouldn't say definite. He talked of a work room and a store room on the second floor.

Q. Did he ever refer to that as a store room on the mezzanine floor?

A. Well, it is my understanding that he did, because we discussed the question of whether the limitation of a work room and the question of a storage room at that time, and I do know that Mr. McKinley stated that in his opinion that was not a storage room; that if that is what we are getting——

Q. That is the point.

A. In his opinion, it was not a storage room. It was part of the work room. That was the discussion.

Q. All right. Now, prior to the fire, and if you don't know just tell us, but prior to the fire were furs kept on the mezzanine just temporarily until they could be worked on, or were they stored there permanently for the season?

A. I don't know. I was only there for a week, and I did not get into that far enough to be able to answer that.

Q. And do you know whether, after the furs had been repaired and worked on, whether they were put in storage in the storage room on the second floor, or not?

A. I couldn't answer that question either. [258]

Q. In other words, when you testified on direct examination that furs were stored there on the mez-

(Testimony of James Milne.)

zanine, all you mean by that is that you saw fur coats hanging there on the racks?

A. Yes. The room was full of fur coats, that is correct.

Mr. Hutcheson: That is all.

Redirect Examination

By Mr. Velikanje:

Q. Mr. Milne, referring to our conversation with Mr. Cheney, didn't we discuss with him the fact that we were—several people were threatening suit?

A. That is correct.

Q. And the store was having numerous complaints? A. That is correct.

Q. And that was felt, due to the fact that we were going to have to protect the good name of the store, Mr. Kirkevold was going to have to go ahead and make settlement or something had to be definitely done.

A. As I said, I was very anxious to have something done because we were having constant complaints.

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all. [259]

(Witness excused.)

Mr. Velikanje: We rest, Your Honor.

R. B. SINCLAIR,

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

Q. Your name is R. C. Sinclair?

A. That is correct.

Q. Where do you live at the present time, Mr. Sinclair?

A. At the present time Stockton, California.

Q. What is your occupation?

A. I am presently employed by the Pollock Stockton Shipbuilding Company.

Q. In what capacity?

A. I am the last end of their auditing department.

Q. You are what?

A. I am the last end of their auditing department. It is one of the war plants that is being closed out. [260]

Q. Do you have any connection at the present time with the defendant, the Home Insurance Company? A. None whatever.

Q. Or with the Fire Companies' Adjustment Bureau? A. None, whatever.

Q. When did you terminate your employment with the Fire Companies' Adjustment Bureau?

A. January 31, 1945.

(Testimony of R. B. Sinclair.)

Q. And you have had no connection with either company since that time? A. None, at all.

Q. You were formerly an adjuster at Yakima for the Fire Companies' Adjustment Bureau?

A. I was.

Q. And that bureau does adjustment work for numerous insurance companies, including the Home Insurance Company? A. That is correct.

Q. During what period of time did you do adjusting work with reference to this Barnes-Woodin fire on May 9, 1944?

A. From the date of the fire to approximately the 9th or 10th of July.

Q. And at that time you were transferred, I believe, to California, on the Port Chicago loss, and Mr. McKinley took over the work here? [261]

A. That is right.

Q. Was there any change in the situation of the premises there, from the time you first examined it until Mr. McKinley took over the adjusting work?

A. You are referring now to the fur department premises?

Q. Yes, referring to the premises.

A. There was material changes to the rest of the building.

Q. I mean in the fur department.

A. In the fur department, I would say the only change was the fact that some of the stock had been moved around from one position to another, and the racks—the moveable racks had probably been shifted but as to the interior construction, so far as I can

(Testimony of R. B. Sinclair.)

recall, there was no change—no repair work was done and so far as I know, nothing was torn out.

Q. No repairing or remodeling had been done until after you left? A. No.

Q. When did you first examine the premises after the fire? A. The next morning.

Q. Had you personally ever been in the fur department before the fire? A. No, I had not.

Q. And the last time you examined the premises before leaving [262] Yakima, did Mr. McKinley accompany you there? A. He did.

Q. That was some time in July, you say?

A. My recollection is that it was along the first part of July, yes.

Q. Now, just go ahead, Mr. Sinclair, and state what you observed on the mezzanine floor of the fur department, there, when you inspected the premises after the fire, with reference to the arrangement of the rooms, and if you wish to refer to the diagram there, why, you may.

A. Well, on my first inspection we had practically no lighting in the place. We went around there with flashlights, and so on, and it was not until a couple of days after that that I made a further inspection in that particular department. The floor had numerous racks—moveable racks, with some fur debris under them. Those—

Q. Pardon me, were these racks on wheels or casters?

A. They had wheels or casters of some sort, as I remember they could be picked up, anyway, and

(Testimony of R. B. Sinclair.)

I think they had casters or wheels on them. Those things had been obviously moved around by firemen, and everything was dripping wet. On this stairs,—the corner, the diagram there, which are not shown on the diagram——

Q. You mean in the upper left hand corner?

A. These stairs over here, the back stairs (indicating on map) [263] on my first trip I found quite a considerable number of fur coats which the firemen had thrown out on the stairs, and they were later, I believe, brought back into the mezzanine floor here, and in general on the first trip it was simply a mess, and it was that way for some little time.

Q. Well, we are principally interested in the arrangement of the rooms, if any.

A. I wouldn't say there was any racks at that stage of the game, because here we had along this closed-in rack, and along this closed-in rack, of course, there were things hanging there, and then there were these moveable racks were around haphazard. If I recall rightly, there were some in here, and I am quite sure there were some back here (indicating), and there was one or two removeable racks over here in what was apparently the work room end, and more or less coats piled around that were not on racks—I suppose knocked off and picked up—something of that sort.

Q. Were there any work tables or sewing machines working equipment there on the mezzanine floor in the fur department?

A. Yes.

(Testimony of R. B. Sinclair.)

Q. Where were they? [264]

A. The work tables were along here. I believe another table along here, and a sewing machine or two—I don't know exactly how much equipment was in there.

Q. Is that where the red mark has been made, marked with the——

A. Approximately that, yes.

Q. Were there any in this lower part w. t. at that time?

A. I believe there was a table in there. Whether it was a work table or not I don't know, but it seems to me there was a table with some coats piled on it.

Q. Were there any tables or working equipment at that time in the part that is marked here "store room?"

A. Not to my recollection.

Q. Is there any door at all to your left at the head of the front stairs on the mezzanine floor?

A. Not as I recall it, and it was merely an open arch. I didn't see any door, and I didn't see any evidence of any door having been removed.

Q. What is your estimate as to the width of that opening at the entrance of the sales room or show room, as they call it?

A. I would say that might be 8 or possibly 10 feet. That is guess work.

Q. And, was there any partition at all at the front of the [265] mezzanine, between the sales room or show room and the rest of the store to the front?

(Testimony of R. B. Sinclair.)

A. Not so far as this part of it was concerned. There was a railing there, a balcony rail and so forth across the front. Further back here, if my memory serves me, there was a plywood partition or something of that type. It may have been panel board.

Q. Was it there at that time after the fire?

A. Some of the remains of it were. Quite a little of it was there.

Q. Referring to the passageway between what is referred to as the sales room and the work room, was there any door of any kind in that passageway?

A. I don't recall.

Q. About how wide would you say that was?

A. About the width of an average doorway. Possibly 3 foot 6 or something of the sort.

Q. And did you ever discuss with Mr. Kirkevold whether there had been any door there previously before the fire?

A. I don't recall having done so.

Q. There was, I believe, what has been referred to as a catwalk along the front of the mezzanine floor.

A. I understood there was. Now, I didn't get out on that myself. [266]

Q. About how wide was that?

A. It was a narrow—just a passageway.

Q. How wide would you say, and what would you say approximately, were the dimensions of the portion of this room that is marked here on the map as a store room?

(Testimony of R. B. Sinclair.)

A. I don't think I can tell you that. I do not have sufficient clear recollection of the dividing lines. I could look at the diagram and guess at it, but it would not be testifying to a matter of knowledge.

Q. Did you have these pictures taken that are in evidence here?

A. I obtained the pictures. I did not have them taken. I don't know who ordered them first, but I was about to have pictures taken and learned Shepards had already made some.

Q. Shepard is a leading commercial photographer?

A. Yes, sir. I believe the representative of the Northwestern Mutual ordered the pictures in the first place.

Q. Did you have any conversation with Mr. Kirkevold during the course of your adjusting work there, in which the matter of the amount of insurance was referred to or discussed?

A. The only amount of insurance that was discussed during my connection with the loss was the \$10,000 coverage [267] outside of storage room.

Q. Just go ahead and tell us to the best of your recollection, in substance, what was your conversation with Mr.—or conversation, or say conversations with Mr. Kirkevold on the subject.

A. Well, I had many conversations with Mr. Kirkevold, and while we were making up a list of the destroyed and damaged coats, he expressed the fear that he was not going to have sufficient insur-

(Testimony of R. B. Sinclair.)

ance to take care of his loss. I think that the first time that came up I told him to wait until we got everything listed, and then would be time enough to commence to worry about it. Subsequently the subject was again discussed, and on one occasion he inquired if I thought that Mr. Orkney could influence the company in some way to perhaps extend the amount of that \$10,000 coverage. To that, as I recall, I told him that I did not know what Mr. Orkney could do. I rather doubted that, but he would have to find that out through Mr. Orkney.

Q. May I interrupt just a moment? You refer there to \$10,000 coverage.

A. That is the only item of coverage that was ever discussed with me in connection with this particular loss.

Q. Was that so stated by Mr. Kirkevold himself? [268]

A. Beg pardon.

Q. Was that so stated by Mr. Kirkevold himself?

Mr. Velikanje: Your Honor, I am going to ask for the conversation. I would like to hear the conversation.

Mr. Hutcheson: He does not have to give the exact words, but go ahead and give the substance of the conversation on that point, referring particularly to when this \$10,000 was discussed.

A. Well, it was discussed at practically all of the conversations we had.

Q. What was said about it?

(Testimony of R. B. Sinclair.)

A. It was simply an assumed matter that that was all we were discussing.

Q. Well, I don't mean what was assumed, but what was said about that.

A. I wouldn't attempt to make a verbatim report on it. I couldn't do it.

Q. We don't mean the exact words, naturally, but the substance of the conversation.

A. All right. The substance of one conversation was that Mr. Kirkevold was worried because of the fact that he thought the claim—the loss was going to exceed the amount of the insurance that he had. At another time, he [269] inquired if I thought Mr. Orkney could do anything with the company in the way of extending that coverage, at which time I told him that the practice of increasing the amount of the insurance after a fire was not a general one, but I did not think anything could be done, but that he could discuss it with Mr. Orkney. At another time——

Q. Could I interrupt there just a moment? You say, as to Orkney extending the coverage—extending the coverage beyond what did he say?

A. The coverage beyond \$10,000 that was under discussion.

Q. All right, go ahead.

A. At another time, Mr. Kirkevold was apparently in a more optimistic frame of mind, and he explained that he thought he could perhaps come out fairly nearly even if he could get a number of his clients to permit him to replace destroyed

(Testimony of R. B. Sinclair.)

coats, and that if he were in a position to replace the destroyed coats, at the cost to him, that by sacrificing his profit he would be able to reduce his loss as against the loss he would have to pay if he settled in cash. He inquired at the time if I thought that was a legitimate thing to do, and I informed him I thought it was perfectly legitimate.

Q. When you say reducing the loss, reducing what loss was [270] he referring to?

A. Reducing the loss he would have sustained over and above his assumed insurance collection of \$10,000, if he were compelled to reimburse the people in cash for the amount indicated by their receipts.

Q. At that time, was there discussed between you what the total loss was, approximately?

A. No, we had not arrived at that stage. When I left here we were making up figures in connection with it, but they were not completed.

Q. When you left, the adjusting work of the insurance company on this fire, had not been completed, had it? A. No, it had not.

Q. Do you recall anything else that was discussed on that point with Mr. Kirkevold?

A. I do not presently recall anything else. As I say, we had many conversations, and we were working from his inventory and the copies of the receipts making up a list, and occasionally we would stop in the middle of the work we were doing and converse for a few moments about his insurance situation. That happened on various occasions.

(Testimony of R. B. Sinclair.)

Q. Other than this discussion which you have mentioned as to trying to get Mr. Orkney to increase the coverage after the fire, was there ever any statement or assertion or [271] contention made by Mr. Kirkevold to you at any time that the amount of the coverage for this fire on customers' coats was more than \$10,000? A. Never.

Q. Never, or that this—or that there was a storage room on the mezzanine floor, did he ever make any such contention or assertion?

A. The question of storage room on the mezzanine floor did not come up at any time with me.

Q. Did he ever make such contention with you?

A. Beg pardon.

Q. Did Mr. Kirkevold ever make any such contention with you at any time?

A. Not to my recollection.

Q. Was there any fur storage room on the mezzanine floor? A. I don't know.

Mr. Velikanje: I object to that, Your Honor.

The Court: He may answer.

Q. Now, let's see—

Mr. Hutcheson: It is 12 o'clock, Your Honor.

The Court: We will go on for a little while.

Q. Mr. Sinclair, did you examine all of the receipts after the fire? A. I did. [272]

Q. And there are a few of these that are missing at the present time. By the way, from all that you saw you did not remove any of them, did you?

A. No, I did not take any with me.

(Testimony of R. B. Sinclair.)

The Court: Now, is there any dispute as to the missing receipts that require additional proof?

Mr. Velikanje: I had not thought so. It was not raised.

Mr. Hutcheson: I don't recall there was any evidence as to what the value of the missing receipts was. We would like to supply that proof.

The Court: Well, let the witness then directly testify to that.

Mr. Hutcheson: There are just a half dozen or so.

Q. Referring to the Carman coat, what was the value stated on the receipt?

A. What was the name?

Q. Carman.

A. One hundred and fifty dollars. It was Mrs. Red Carman. Wapato.

Mr. Velikanje: Mrs. Rex, I think it is.

Q. Same question as to the Moore coat, Mrs. J. E. Moore. A. Mrs. J. E. Moore? [278]

Q. That receipt did not stipulate a value. Same question as to the Munsel receipt.

A. Mrs. C. E. Munsel, \$100.

Q. There was no receipt, was there, as to Odell?

A. Odell?

Mr. Velikanje: I think that was admitted.

A. Apparently not, I don't have it on the list.

Q. Same question as to the Stewart receipt.

A. Stewart—Mrs. Agnes M. Stewart, there was no value stipulated on the receipt.

Q. Same question as to the Elmer Thomas receipt.

(Testimony of R. B. Sinclair.)

Mr. Velikanje: What was that, Elmer Thomas?

Mr. Hutcheson: Or Mrs. Elmer Thomas?

A. Mrs. Elmer Thomas, there was a value of \$200 on the receipt.

Q. Same question as to the Verd receipt?

A. Verd, we didn't have a receipt on that item.

Mr. Hutcheson: That is all.

Cross Examination

By Mr. Velikanje:

Q. Mr. Sinclair, what was the reason you stopped the adjusting of this Barnes-Woodin——

A. I was transferred to California in connection with the [274] Port of Chicago loss.

Q. Didn't you have an accident up here?

A. I did. I had an automobile accident.

Q. What date was that?

A. I couldn't tell you. It was about 3 weeks before I left here, the latter part of June, if I remember rightly.

Q. The latter part of June?

A. That is my recollection.

Q. Then, you adjusted not up to July—it was only up to the time of your accident?

A. So far as this particular case is concerned, yes, that is true.

Q. Then, you were here from May 9th to June what, approximately?

A. About the 24th or 25th, I think it was, somewhere in there.

Mr. Hutcheson: His question is how long were you here?

(Testimony of R. B. Sinclair.)

Q. How long were you adjusting?

A. How long was I active on this particular loss?

Q. That is it, about June 24th?

A. Approximately that, yes.

Q. Now, you testified that you were never in this storage space on the mezzanine floor prior to the fire? A. That is correct. [275]

Q. About, after the fire when you came in here, there was nothing in this space except fur coats and some boxes of fur pieces that had been pulled off the top shelves?

A. Quite a bunch of debris of various kinds. I could not identify.

Q. It was all pretty badly burned?

A. Pretty badly burned.

Q. How about the back stairs?

A. The back stairs had a pile of fur coats on them that had been thrown out there, I presume by the firemen, wet, and in most cases burned to some degree.

Q. This is Exhibit 10. Would that be——

A. That is correct.

Q. Those were there at the time you——

A. Yes.

Q. Everything was pretty much of a mess in that department? A. Yes.

Q. It was pretty much impossible to tell where anything had been in the fire?

A. That is correct.

(Testimony of R. B. Sinclair.)

Q. Did you ever go over the insurance policy with Mr. Kirkevold?

A. I don't recall that I went over the policy with him. I did not have the policy in my possession. I had what [276] is called a daily report. That is, the agency copy of the policy, and was working from that.

Q. Did you read him over the provisions of the policy, I mean?

A. I do not recall that I did.

Q. Did you advise him that he had only \$10,000 coverage?

A. I don't know just what you mean by the term advised. We discussed this coverage and I told him he had \$10,000.

Q. You told him he had \$10,000?

A. And he told me the same thing, and Mr. Orkney told me the same thing.

Q. But, you never discussed the storage space with him? A. No.

Q. Who first brought up this \$10,000 provision?

A. Why, it was brought up when the loss was reported to me for attention.

Q. Who reported it to you?

A. I believe Mr. Orkney did.

Q. Mr. Orkney. That is the agent of the Home Insurance Company here? A. Yes.

Q. One of the agents? A. Yes.

Q. Now, you said that Mr. Kirkevold discussed with you [277] whether that coverage of \$10,000

(Testimony of R. B. Sinclair.)

could not be increased. Well, didn't he refer to the \$100,000 provision in the policy? A. No sir.

Q. What did he refer to?

A. He referred to the possibility of having Orkney securing an additional amount of insurance on him, on the second item of the policy.

Q. You mean, in the future?

A. No, I mean then. Understand, it was a question whether I thought there was any possibility of anything being done to help his situation.

Q. You mean, of re-writing a policy back?

A. Exactly.

Q. You mean to say he suggested re-writing the policy back?

A. I did not make that statement. I said he inquired of me if I thought there was any possibility of getting any action taken.

Q. Of increasing his coverage?

A. Yes sir.

Q. But, he did not say of re-writing the policy, or dating it back? A. Yes.

Q. He just spoke of increasing his coverage, is that right? A. That is right.

Q. Did you ever have any conversation with Mr. Milne of Barnes-Woodin Company?

A. I had numerous conversations with Mr. Milne.

Q. You were adjusting some of their other losses, too? A. That is correct.

Q. I am referring particularly to the Kirkevold loss.

A. I had conversations with Mr. Milne to this

(Testimony of R. B. Sinclair.)

extent, that he inquired of me immediately after the fire if I thought Mr. Kirkevold was going to have sufficient insurance to cover his loss, and at that particular time I told him that I didn't know, because we did not know what his loss was—we hadn't gone far enough along with it, and I don't recall any conversations subsequent to that in which Mr. Kirkevold's insurance was discussed with anyone, other than Mr. Kirkevold or Mr. Orkney. I do not discuss one client's insurance with another.

Mr. Velikanje: I believe that is all.

Redirect Examination

By Mr. Hutcheson:

Q. Did the point ever come up in your conversations with Mr. Milne as to what was the amount of the insurance coverage that Kirkevold had?

A. I don't recall definitely whether it was stated in dollars and cents or not. [279]

Q. But, as I understand it, in your conversations with Mr. Kirkevold, was or was not that ten thousand dollar limit of the coverage of insurance as to customers' coats referred to by both you and also by Mr. Kirkevold? A. That is correct.

Q. By the way, as a result of this automobile accident, you were not hospitalized, were you?

A. No, I was not hospitalized, but I was compelled to stay at home. I injured my knees and couldn't walk. That is the whole story.

Q. And, as you have stated after the accident, some time in July, you again went to the store in company with Mr. McKinley? A. Yes.

(Testimony of R. B. Sinclair.)

Q. To the Barnes-Woodin Store?

A. Yes, that is right.

Mr. Hutcheson: That is all.

Recross Examination

By Mr. Velikanje:

Q. Mr. Sinclair, you never discussed this insurance policy with me or any other attorney representing Mr. Kirkevold? A. Yes, sir.

Q. You never had any interpretation of the policy prior to [280] your discussion with me?

A. No.

Mr. Velikanje: That is all.

(Witness Excused.)

The Court: We will take an intermission now until 1:30.

(Recess.) [281]

1:30 o'clock p.m.

MRS. CHARLES VERD

produced as a witness on behalf of the defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

Q. Your name is Mrs. Charles Verd?

A. It is.

Q. Mrs. Verd, did you have the Barnes-Woodin

(Testimony of Mrs. Charles Verd.)

Fur Department make a fur coat for you prior to the fire of 1944?

A. Yes, my mother-in-law had a fur coat made for me.

Q. Let's see, who provided the fur materials to make the fur coat? A. My mother-in-law.

Q. And how many furs were there for that purpose? A. Well, I think there were 76.

Q. And she had bought those elsewhere, had she, other than at Barnes-Woodin?

A. In Alaska.

Q. And then, just for what purpose were they to be used—that is, to make a fur coat for her and also a fur coat for you? [282]

A. Yes, her coat was to be made from the backs, and mine was to be made from the part of the furs that were left.

Q. And had her coat been completed and delivered to her before the fire? A. Oh, yes.

Q. Where is your mother-in-law now?

A. She is in Seattle.

Q. And your coat had not been delivered to you at the time of the fire? A. No, it had not.

Q. Had you seen the receipt that had been issued by the Barnes-Woodin Fur Department with reference to that matter?

A. Well, I am sure there was a receipt given, but what it said on it I don't know.

Q. You don't have that receipt yourself?

A. No, I have not.

(Testimony of Mrs. Charles Verd.)

Q. Have you seen it since it was originally issued?
A. No, I don't think so.

Q. Did you ever see it yourself?

A. Well, I don't remember. I remember that there was a receipt given for the furs when we took them up there that day?

Q. You remember whether there was any value stated on the receipt? [283]

A. No, I don't know whether it was just for the number of furs, or what.

Q. You don't recall——

Mr. Hutcheson: I believe that is all.

Cross Examination

By Mr. Velkanje:

Q. Mrs. Verd, a settlement was made with you by delivering to you a new coat, was it not?

A. Yes sir.

Mr. Velikanje: That is all.

(Witness excused.) [284]

L. M. McKINLEY

produced as a witness on behalf of the Defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

The Clerk: Your name?

The Witness: L. M. McKinley.

Q. What is your occupation, Mr. McKinley?

A. Insurance Adjuster.

(Testimony of L. M. McKinley.)

Q. Employed by whom?

A. The Fire Companies' Adjustment Bureau of New York.

Q. And where do you reside at present?

A. 458 20th Avenue, San Francisco.

Q. And were you formerly employed by The Fire Companies' Adjustment Bureau at Yakima?

A. I relieved here in 1944—'44.

Q. You have been doing insurance adjustment work for approximately how many years?

A. A little over 35 years.

Q. With whom were you when you first examined the Barnes-Woodin Store after the fire in May, 1944?

A. Mr. R. B. Sinclair.

Q. And he had been doing the adjusting before that, and he [285] was being transferred to California, as I understand.

A. He was branch manager at this office and was transferred to California shortly after that.

Q. And then, you worked on the adjustment of this Barnes-Woodin Fur Department loss, from that time, while you were in Yakima, did you?

A. Yes. I took over about July 25th or 26th.

Q. And prior to that, earlier in the month of July, did you go to the Barnes-Woodin Store—the Fur Department there with Mr. Sinclair?

A. Yes, we made one or two trips. I went up there with him once or twice.

Q. He introduced you on one of those occasions to Mr. Kirkevold?

(Testimony of L. M. McKinley.)

A. I would not say positively that he introduced me to him.

Q. Now, would you just go ahead, Mr. McKinley, and just explain—referring to the map there if you wish, what was the situation as to the floor and rooms and so forth on the mezzanine at the Barnes-Woodin Store Fur Department.

A. This has been gone over very well. At the time I arrived there, that was in July, the furs were still on racks piled on tables. There was a lot of loose odds and ends—scrap, other than debris of coats, machines, sewing machines, work benches and this partition here (indicating) had been pretty well burned [286] out. It was a very light construction. Oh, I would say about two by three, the heaviest stud was. Just plyboard, apparently on it. Between—

Q. That is, the partition marked “P,” near the edge of the mezzanine?

A. That is correct. That is this one here. (indicating) These cases, I think Mr. Kirkevold used the term “bin” with regard to them, here (indicating), that were set around the edge of the sales’ space had been pretty well damaged and destroyed. Now, there was no evidence I could see of a door or door frame at this opening here (indicating).

Q. Referring to—first to the opening into the sales’ room at the top of the front stairs, about how wide was that?

A. This opening was about—oh, it is between 8 and 10—7 to 9 feet I would say, not quite 10.

(Testimony of L. M. McKinley.)

Q. And was there any evidence of a door or anything of that nature at the opening between what is referred to here as the sales' room and the work room?

A. There was neither a door or evidence of a frame for a door on that opening at the time I saw it.

Q. And about how wide was that opening?

A. It was about—close to three six.

Q. Three feet 6 inches? [287] A. Yes.

Q. Referring to the north and west sides of the sales room, were there any walls there, or were those just show cases?

A. Well, there was a built-up case I believe. They went practically to the ceiling. They did form a brake at those points. However, you could stand at this point here (indicating) and see clear through to the other—to the other end of this work and fitting room they called it, while I was there.

Q. You say that this room that is marked work room, was that ever referred to by any name by Mr. Kirkevold himself in your talks with him?

A. No, not other than the work room back there, and fitting rooms, generally. I believe they fitted there also is my understanding I got from the thing.

Q. Did you get that understanding from Mr. Kirkevold?

A. He is the only man I ever discussed it with.

Q. Is that what he called it in talking to you?

A. Yes.

(Testimony of L. M. McKinley.)

Q. While we are on that point, did Mr. Kirkevold ever refer to that as a storage room, and if so, what?

A. I cannot recall him of ever discussing it as a storage room. [288]

Q. What did you observe as to the location of any work tables or sewing machines, or working equipment on the mezanine?

A. Well, there was tables along the windows here (indicating)—we will say work table in this general neighborhood here. I would not say that is the exact location. There was a sewing machine about in here, as I recall it (indicating).

Q. That is, these red marks that have been placed there that day “w.t.” written three times, are those approximately correct?

A. There were tables along that general area there.

Q. Was there anything in that part of the map marked “store room”?

A. Well, now, just as to whether that was 2 feet from this, or more over this way, my recollection of it would place it more over this way (indicating)—out toward this (indicating), but back in here, this is not wide enough for any great amount of——

Q. What is the width of the portion of the building there that is referred to as store room, the northern and southerly direction, which would be up and down on the map?

A. That is about 9 to 10 feet by 16 to 20,

(Testimony of L. M. McKinley.)

there. This, of course, here, (indicating) there is only about,—that is a little over 8 feet at most. It will probably be 10. [289]

Q. The width you have stated, does that include the catwalk, in addition?

A. No, that is not in addition to the catwalk.

Q. Approximately what was the width of the catwalk?

A. The catwalk was about $2\frac{1}{2}$ feet. I never measured that. In fact, I never measured any of these except paced them at times.

Q. Was there a door at the point indicated here, between what is called on the map the store room and the back stairs?

A. Yes, there was. In fact, that was the first time I went in, if I recall, I went in through that door.

Q. And is the location of the door shown correctly on that map there?

A. I don't place it as being right against the corner there. It is my recollection that it is a little bit further along. There is not much difference.

Q. A little further towards the west or left?

A. To the west, yes sir.

Q. Was there any partition or wall, or line of demarkation of any kind whatsoever, between what the plaintiff has marked there work room and storage room?

Mr. Velikanje: I think that is admitted, Your Honor. I don't think there is any dispute on it.

(Testimony of L. M. McKinley.)

A. I would have a hard time saying where one began and—— [290]

Q. To all appearances, was it or was it not one single room? A. I considered it such.

Q. Did you, from your observation, was there any fur storage room on the mezzanine of that building?

Mr. Velikanje: I object to that, Your Honor.

The Court: He may answer. Objection will be overruled.

A. Not in the sense that the interpretation of the policy that I had——

Mr. Velikanje: I object to that. I am objecting to his interpretation.

The Court: No, his interpretation of the policy—just go ahead and explain what you mean.

A. The copy of the policy—the policy in my possession, contained limitations. One, being for one hundred thousand for stock in vaults, fur storage room, and I believe there is one other definition. The other was vaults outside. Well, naturally my first duty was to determine where this stock was located, if it were in the fur storage room it would come under one heading. If it were outside, it came under the other.

The definition generally of the room, as we have given this here—rather, this area, is really no different than it would be if it were piled anywhere throughout the mezzanine, or over at any place in the [291] general store room. It was open to the

(Testimony of L. M. McKinley.)

general public. That is, there was nothing to stop a person from going in a fur storage room.

Mr. Velikanje: Your Honor, I am going to object to this line of testimony. I do not believe it is proper.

The Court: Objection will be overruled.

Mr. Velikanje: Note an exception.

A. The fur storage room, in the contemplation of the policy, and I have had a good deal of experience in my marine losses, naturally, meant a place for safekeeping, where things would be stored with some degree of certainty that they would not be open to robbery, theft, ordinary carelessness of passersby—employees, so I immediately took that stand that it was—this was not a fur storage room.

Q. Did you ever make a statement to Mr. Milne or Mr. Kirkevold that there was any storage room on the mezzanine floor?

A. I don't recall any discussion with Mr. Kirkevold over it. Our relations were very pleasant, and after taking a non-waiver agreement so I could go forward without hurting the company's interest in any way, he and I identified some one hundred and thirty, I believe, out of a hundred and sixty damaged garments there, and placed [292] most of the owners.

Later, Mr. Milne and I had a conversation at the store. It was generally very much to the effect that he gave in his testimony, so I won't repeat it, but I will say this, that he further argued that the entire store was a storage room.

(Testimony of L. M. McKinley.)

Q. Did you agree?

A. Any place in the store was a storage room or store room, I think was the term he more properly used.

Q. Did you agree or disagree with that?

A. I disagreed with it as a storage room.

Q. You heard the testimony of Mr. Sinclair this morning as to the value that appeared on the receipts that are now missing. Did you, after you took over the adjustment, did you check over those, and,—

A. I checked.

Q. Was his testimony correct as to those figures?

A. Mr. Kirkevold and Mr. Velikanje very kindly let me have the receipts. I had them long enough in my possession to check the same list and Mr. Sinclair and Mr. Kirkevold and I checked the values, and they were in order.

Q. Were the values testified by Mr. Sinclair today, the values stated on those particular receipts?

A. Yes, they were. Of course, there was one that was not there. [293]

Q. Showing you this photograph, defendants' identification "B", did you have Mr. Shepard take that picture? A. Yes.

Q. Will you just explain where that is, and just what that shows?

A. Yes, I can do it best from here. I did it more as a confirmation of this value thing. This line—correct me if I am wrong, this is west, is it not?

The Clerk: North.

Mr. Velikanje: This west, and this is north.

(Testimony of L. M. McKinley.)

Mr. Hutcheson: On the map west is to the left.

A. Then, this is north. This line here, are the line of bins that is on the space now, bins, or show-cases, that——

Mr. Velikanje: Are those chalk marks where you put down there?

The Witness: No, those are the marks on the floor that were left by the pieces of furniture when they were moved. This was done—I guess it must have been along in October, at the time they cleaned that off for reconstruction of the mezzanine, and when they cleaned it off I noted these, and it occurred to me that it would have some value, or might be, in case of any further difficulty was regard to this claim. They were not brought out in any way. They are just as it stayed. [294] It is common whenever you have a piece of wood down on the floor, nailed down for months, take it up, and you will always have those lines.

Mr. Hutcheson: Just go ahead.

A. (continuing): As you will note, this is V-shape, here is where the mirrors were. This is the opening here, and this is where the ends of the cases—just about this part of them, where they run back to the catwalk.

Now, you will note these start down about here, where there is the—there was a doorway, and a—well, I don't know how that was finished there. I would not attempt to describe it.

Q. This picture was taken at a later date than the other pictures?

(Testimony of L. M. McKinley.)

A. Yes, yes, not until the furniture and mezzanine was cleaned out for the new construction work.

Q. In other words, these showcases had been removed prior to the taking of their——

A. Oh, yes, because these are the marks where their base stood.

Mr. Hutcheson: We offer it in evidence.

Mr. Velikanje: I think it is immaterial, Your Honor, as to showing what is involved in this case.

Mr. Hutcheson: Since there is a question——

The Court: It will be admitted in evidence.

(Whereupon, picture referred to was then received in evidence and marked Defendant's Exhibit "B".)

Q. You have been engaged in the insurance business, you say, for over 30 years?

A. It will be 50 years on the 6th of next month. I hate to admit it.

Q. In the insurance business, does a local agent of an insurance company have any authority to change terms or conditions of an insurance policy?

Mr. Velikanje: I am going to object to that, Your Honor.

The Court: I think probably the question is wrong.

A. It would be too involved to answer, Sir.

Mr. Hutcheson: Well, we offer to prove that the answer would be in the negative.

Mr. Velikanje: What was your Honor's ruling?

(Testimony of L. M. McKinley.)

The Court: I sustain the objection to that on the ground that it calls for a legal conclusion.

Mr. Hutcheson: I think that is all. [296]

Cross Examination

By Mr. Velikanje:

Q. Mr. McKinley, referring to this exhibit "B", I believe it is, can you show on this plat where this picture was taken from?

A. Yes, the camera was centered at just about this point here (indicating).

Q. And looking towards the east?

A. Looking towards the——

Q. Looking towards this side of the map (indicating)?

A. Yes. Well, this is Third Avenue and looking towards Fourth, that is the way it is.

Q. Towards the east. This would not show the storage space in back?

A. No, that is back up there.

Q. I say, this picture has nothing to do with that storage space?

A. Not up to this tail end.

Q. It was back in this—well, if it is just back——

A. Yes, it was, too.

Q. Just back of this door, was it not? I mean, where the bottom of this picture starts, just back of the showcase frame? [297] A. Yes.

Q. And this space between these two marks would be the doorway?

A. There was no opening, any more than there is between——

(Testimony of L. M. McKinley.)

Q. I mean, previous to that time—previous to that time these two marks would indicate where that doorway had been?

A. There was no doorway there.

Q. Let's say an opening there.

A. There was an opening there between the ends of the two cases.

Q. All right, but there was a passageway through there? A. A passageway.

Q. That went——

A. The first time I saw it, as I recall, there was a pole and remnants of a curtain there.

Q. By the time you saw it, things had been quite well—a lot of things had been cleaned up, had they not?

A. You mean the first time I saw this?

Q. Yes.

A. Those pictures were taken immediately after the fire, there had been practically nothing cleaned.

Q. Weren't quite a few of the coats you looked at upstairs in the beauty parlor space, hadn't they been moved up in another location and hung? [298]

A. Where is the beauty parlor space?

Q. Up off of the elevator, on the east of the elevator as you go up on the second floor?

A. The elevator? Now, wait a minute, you go up the stairway. At that time there was a hat shop directly across.

Q. That was on the mezzanine. Then, you go up that same stairway, at the top.

A. There was nothing up there at all.

(Testimony of L. M. McKinley.)

Q. You don't remember seeing those coats up there?

A. There was nothing up there. In fact, as I say, except for about 30 that we couldn't find and which were explained as having been thrown out in the alley, or down on that stairway and then thrown out by the Fire Department, all of the coats were right in there and identified, and——

Q. Some of the coats were so far gone there was just a few ribbons hanging over the hangers, were there not?

A. There was hardly a coat there but what there was sufficient not only to identify, but many of them you could tell a great deal about them.

Q. But, you agreed with us at that time there was no salvage in them?

A. No, the cost of handling what little salvage that would have been there, I considered——

Q. Wouldn't consider the salvage? [299]

A. Warrant the offset of any values, and again, we only had \$10,000 at stake in my——

Q. You and I had several discussions on that, did we not? A. We did, I believe, yes.

Q. And we disagreed very emphatically?

A. Yes, along the same——

Q. And I advised you that was the first time I had been brought into the matter is that not correct?

A. Yes, I believe you told me. I think I talked to you before I went over to Mr. Kirkevold's as a matter of courtesy, I came to you.

Q. And I think we both went over and went

(Testimony of L. M. McKinley.)

through everything that was there, and let you have all of our records? A. You did.

Q. Did I not ask you at that time why Mr. Sinclair had not raised this question of storage room?

A. I don't think so, Mr. Velikanje.

Q. Didn't you advise me because of the accident Mr. Sinclair had had, you had had a little trouble in getting some of the information and things from him?

A. It might have been that you did ask. I don't recall it.

Q. But, you did have some trouble in getting some of the records and things Mr. Sinclair was working on?

A. Well, he had them at home. They had left the office.

Q. Did you discuss with me or Mr. Kirkevold, about these [300] certificates that were issued?

A. No.

Q. Hadn't I——

A. There is nothing of any import that comes to my mind.

Q. Hadn't you shown your inclination to pay those direct to the certificate holders?

A. Well, I believe they would have to be paid direct to the certificate holders.

Q. But, had you not communicated with them and told them they were going to pay them?

(Testimony of L. M. McKinley.)

A. Some of them I believe filed proofs. I don't know.

Q. And then after—some time after our first meeting you raised the question as to whether those would come under the limitations of the policy?

A. I did not raise it. That is a matter of the company's. That was beyond my jurisdiction—my prerogatives ended before that.

Q. Mr. McKinley, I hand you plaintiff's identification 11. Is that your signature to that letter?

A. That is correct.

Q. That letter was written to one of the certificate holders? A. That is correct.

Q. And similar letters were sent to all of the certificate holders? [301]

A. Now, wait a minute. Yes, it was, that is correct.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: Objected to as immaterial, irrelevant and improper.

The Court: The objection will be overruled.

(Whereupon, letter referred to was then received in evidence and marked plaintiff's exhibit No. 11.)

Q. Mr. McKinley, from the information you were able to obtain, what was this space marked "store room" used for?

A. It apparently had been used for a reception place for garments brought in as they were being processed and passed for storage.

Q. Well, those garments were stored——

(Testimony of L. M. McKinley.)

A. Incidentally, there were other findings, and stuff brought in there.

Q. Such as what? A. Oh——

Q. Except there were these.

A. There were findings, was the only word I know would cover just the small stuff you would find around a work shop of that kind.

Q. There were fur pieces?

A. Loose furs and scraps and so forth, and tape and stuff of [302] that kind. I don't know. I didn't pay much attention to it.

Q. That was in July?

A. It was in July.

Q. You don't know what that was like prior to the fire? A. I couldn't tell you, sir.

Q. But, isn't it a fact that from the information you were able to obtain, that that space was used for the storage of furs?

A. It would not be used for the storage of my furs in this climate.

Q. Weren't they using it for that purpose?

A. No. As I was given to distinctly understand by them, they were there during the period in which they were being processed before storage, and placed in storage.

Q. Before they are placed in the storage upstairs? A. Yes.

Q. If a coat was there for a month, did you not understand it was left down in this space before they were able to get to it? A. No.

Q. Who told you otherwise?

(Testimony of L. M. McKinley.)

A. Well, simply—no one told me one way or another. I don't know what their conditions were with regard to their labor there. [303]

Q. But, your statement to me and to Mr. Kirkvold was that in your opinion, that was not a storage room? A. Correct.

Q. And you don't remember any statement made by me to you asking why Mr. Sinclair had not advised us of that?

A. No, I don't really recall that, Mr. Velikanje. That is further impressed upon me by the fact that if he had had this condition come up, he would have done just what I would have done, of what I did, refuse to proceed any further without a non-waiver agreement. That is one of our absolute rules.

Q. A non-waiver agreement was signed by both parties?

A. At my request, when this hundred thousand dollar business was brought up to me. That was signed by me, if I am not mistaken.

Q. I hand you plaintiff's identification 12. That is the extension you gave us, did you, to the period of time we were trying to adjust this matter, is that not correct?

A. This was an extension of time for filing proofs of loss. That is not the non-waiver I spoke of.

Q. But, a non-waiver agreement was signed between the parties? A. Yes.

Mr. Velikanje: I will offer that in evidence.

(Testimony of L. M. McKinley.)

Mr. Hutcheson: No objection. [304]

The Court: It will be admitted.

(Whereupon, extension referred to was then received in evidence and marked plaintiff's Exhibit No. 12.)

Q. Mr. McKinley, you refer to the work table that you stated was out in that room when you saw it in July. That table was not nailed down, was it?

A. Oh, no.

Q. That was just a fairly small moveable table?

A. Well, it was—oh, about three six feet, from about three and a half in width, larger than the small ordinary desk.

Q. But, this space you testified, what has been called the store room on this map, was approximately ten by twenty, isn't that what you stated?

A. Oh, no, it is a little bit—from—this is about—I would say that is eight feet by about six, and from this point on here, you have got—that is about fifteen by ten, from there on.

Q. Fifteen from that point? I hand you plaintiff's identification 13, is that the non-waiver agreement testified to?

A. Correct.

Mr. Velikanje: We offer it in evidence. [305]

Mr. Hutcheson: No objection.

The Court: It will be admitted.

(Whereupon, non-waiver agreement referred to was then received in evidence and marked Plaintiff's Exhibit No. 13.)

A. I signed a duplicate.

(Testimony of L. M. McKinley.)

Mr. Velikanje: That is all.

Mr. Hutcheson: That is all.

The Court: When you were assigned to the adjustment of this loss, which was some substantial period after the loss had actually occurred—probably 60 days or more.

The Witness: Yes.

The Court: Did you take up the work that your predecessor and adjuster had done, or attempt to take it up at the point where he left off?

The Witness: Well, his work had broken off very carefully at a very natural point. He had inventoried the merchandise in the storage vault upstairs for the purpose of avoiding any duplication, or the possibility of something creeping into the list burned downstairs that we found up there. That part had been checked very carefully, and all the undamaged garments checked and at that point it had stopped. [306]

The Court: Had his work gone to the point where in his own judgment he determined the nature and extent of liability under the policy?

The Witness: As set forth by the policy, yes, sir.

The Court: And you were advised of his position as to that matter.

The Witness: Well, yes, in this much that we simply turned it over and said “there is the loss, and here is the copy of the policy.”

The Court: The issue as to whether this was an incendiary fire was never involved in this case?

(Testimony of L. M. McKinley.)

The Witness: I never heard a thing to that extent?

The Court: The issue as to whether or not there was a fraudulent proof of loss being made was not involved.

The Witness: No, I think I have always found the intent there to be very——

The Court: Well, then, the issue of liability on this policy under the rather peculiar and unusual provisions that it has, were you advised of that by your predecessor before you went onto the job?

The Witness: Merely to the fact that here was a loss, and it was—I asked storage vault—storage—— [307]

The Court: What I am trying to get at, did he advise you that in his judgment much of this loss occurred in the place that could not be classified as a storage room or vault, or a safe?

The Witness: No, other than it was outside of the storage vault. That is the only thing he said, and I took right on.

The Court: Well, that would be almost an affirmative answer to the question I asked you. It was his construction that the property that was destroyed or lost by the fire——

The Witness: Oh, yes.

The Court: (Continuing): Was outside the storage room vault or safe.

The Witness: Yes.

The Court: Those are the words.

The Witness: Yes, that is.

(Testimony of L. M. McKinley.)

The Court: Therefore, would fall under this minimum liability of the policy, rather than under a maximum limit of the policy.

The Witness: Correct.

The Court: Well, did you go on the job then with the purpose of determining that question again on your own initiative, independent——

The Witness: Absolutely. [308]

The Court: (Continuing): Independent of what he had told you.

The Witness: If I might digress for a moment, for instance, he stated to me that he did not see the necessity of my going forward and checking the merchandise destroyed, as the amount involved—and this confirms what you have put before me, that the amount—limit of liability would not be met, the insurance loss, and I said, well, I would go forward with it anyway, because after all this is a policy that is written for the benefit of third parties, and we have obligations there and must watch that.

The Court: But, you did not accept his conclusions in that regard.

The Witness: No, I did not.

The Court: And then you looked the ground over again to ascertain whether this would be a storage space or storage room, or what?

The Witness: Yes, I spent a couple of days up there.

The Court: You realized the major issue in this controversy was that?

The Witness: Oh yes.

(Testimony of L. M. McKinley.)

The Court: That issue. [309]

The Witness: Yes, sir, and that is the reason I took that non-waiver agreement as soon as that came up. I wanted to go forward with the work, but I did not want it in any way to stop the company from any proper defenses.

The Court: Did you discuss it with the local agents?

The Witness: I saw Mr. Hargraves a few times—or Mr. Orkney, but did not go into any detailed discussion with him over that part.

The Court: You did not ask him if—what if any degree of familiarity he had with the arrangement that was prevailing?

The Witness: No, I did not, as I recall to this extent, Mr. Orkney is not very familiar with these inland marine policies. They are not written in these offices. The local agencies have to send in proposals and rates are made, and the policies are usually written at a central office and mailed for local signature.

The Court: But, you appreciate of course that he was the local agent, and his knowledge was the knowledge of the company—in that of the insurance company.

The Witness: Yes, it would be. I should imagine that is a matter of law. I would not pass on. [310]

The Court: But, you did not discuss with him, you say, at all, anything in connection with the origin of this insurance and the changes that might

(Testimony of L. M. McKinley.)

have occurred from the time the original application was made and the original coverage was issued, and the time that the loss occurred.

The Witness: No, I did not go into any detail of that.

The Court: Because this was a contract of insurance that was indefinite in the matter of time, and dependent on the payment of premiums—I think that is all.

Redirect Examination

By Mr. Hutcheson:

Q. You used the term “inland marine insurance.” Just for my information, what does that term mean?

A. As distinguished from fire insurance, a good deal of it, I would say, is a statutory definition by your state. It applies to policies covering hazards other than those included in a fire insurance policy. Normally the location is widened or broadened. In this case, it covers theft, mysterious disappearance, and an accidental damage to the coat. A woman is out— [311] gets out of a car, snags her coat and tears it, it is covered under your inland marine policy, where it would not be under a straight fire policy with its limiting form.

Q. That is assuming that it is at a location that is covered, of course? A. Correct.

Q. In other words, it is somewhat broader coverage than a straight fire policy?

A. It covers more hazards of ocean marine.

(Testimony of L. M. McKinley.)

Q. Referring to the point that his Honor brought up, as I understand the contention of the insurance company, that the liability here was limited to \$10,000 because this was not a storage room on the mezzanine floor. As I understand it, that conclusion was reached by you, but it had previously been reached while Mr. Sinclair was on the job, is that statement correct or not?

A. Well, yes, Mr. Sinclair reached it also.

Q. It was not a new idea on your part, you don't mean that, do you?

A. Well, I can only answer that, no. It was not a new idea. I did not invent the thing, no. It is a condition which spoke for itself.

Q. Were you ever told by Mr. Kirkevold or by anyone else, prior to the trial of this case, that there had been any [312] changes made of any kind after the issuance of the policy, and before the fire?

A. No, it would have made no difference to me, anyway, because——

Q. Why?

A. Because those are conditions. They are made conditions under which those policies are issued, or represented to a company, and as long as those conditions do—the conditions upon which they cover continue, he might have moved next door, this policy would not—and the agent might have known it, but the policy would not automatically have followed him, or at least I wouldn't——

Mr. Hutcheson: I believe that is all.

(Testimony of L. M. McKinley.)

Recross Examination

By Mr. Velikanje:

Q. Mr. McKinley, if this is on representation, on information, why was this policy written with the words "store rooms," plural—why wasn't it written with the word "storage room."

A. Those policies at times will cover. I happen to know one that is written for \$2,000,000, and there are dozens of rooms, and it is on this same form. This form was not especially printed for Mr. Kirkevold. It is national in use by all of the large furriers. [313]

Q. Do you know if the Home Insurance Company ever explained that to Mr. Kirkevold?

A. They did not print a special form for him.

Q. Yes, or that this—

A. (Continuing): I don't imagine they would.

Q. Or that it was limited to one room.

A. Now, you are asking me to—

Q. Well, you don't know what was done at the issuance of this policy, or subsequent thereto up to the time you came into the matter?

A. No, but I can read English.

Q. You stated that Mr. Sinclair had completed his inventory. Why then did you go back and go over all of those coats?

A. I did not say that he had taken an inventory downstairs. I said that he had completed an inventory of the storage room.

Q. I thought that in response to the Judge's

(Testimony of L. M. McKinley.)

question that you had stated that he had completed——

A. He had upstairs. I went back and inventoried this burned and damaged stuff on the lower floor.

Q. Mr. Sinclair had not completed it enough to know what the actual loss was, had he?

A. He had not done any inventory on that floor.

Q. So it was not known to be under the ten thousand, or what [314] it was, except a guess?

A. Yes, it would, because the condition of that merchandise was such as I told you. It was very little salvage can be considered, and when by elimination he determined what merchandise in storage had not been damaged, simple arithmetic would give him the difference between that figure and the burned lot downstairs. That is elemental.

Q. Did he give you the elements from his simple arithmetic as to what that damage was, what the extent of it was?

A. They had made up their list there, something around \$30,000 as I recall. I think that list of his runs around that.

Q. Is that his list or our proof of loss?

A. No, the list that he and Mr. Kirkevold made up—the one that he was speaking of in regard to that Verd file.

Q. When did Mr. Sinclair express to you that this was under the \$10,000 provision?

A. Oh, let's see. To tell you the truth I never discussed this thing very much with Mr. Sinclair.

(Testimony of L. M. McKinley.)

Mr. Velikanje: That is just what I thought.

(Continuing): Very little.

Q. Didn't I express to you that you would take the attitude that was not a storage room?

A. Yes sir, you did, and I was very much surprised when you [315] took the attitude.

Q. But, that question, so far as you and I were concerned, had never been raised before, had it?

A. Not to my knowledge, it never had.

Q. And you state now you had not discussed it very much with Mr. Sinclair?

A. Well, that is quite true, exactly what I said.

Q. Do you know why Mr. Sinclair had not taken a non-waiver agreement?

A. No, I never asked him. I said I had not discussed it to any great extent with him.

Mr. Velikanje: That is all.

Redirect Examination

By Mr. Hutcheson:

Q. Counsel asked you a moment ago, he said as far as you were concerned that is the first time the point ever came up. Had you ever discussed that before, that occasion he is referring to?

A. I don't recall whether one or two conferences I had with him. I think the first one we discussed it over in his office. I think probably I called the second time, didn't I, Mr. Velikanje?

Mr. Velikanje: I think we were two or three times together. [316]

Mr. Hutcheson: That is all.

(Witness excused.)

Mr. Hutcheson: We offer in evidence this original release. There is no objection, is there?

Mr. Velikanje: No objection.

(Whereupon, original release referred to was then received in evidence and marked defendant's Exhibit C.) [317]

JAMES W. ORKNEY,

produced as a witness on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

The Clerk: Your name, please.

The Witness: James W. Orkney.

Q. Your name is James W. Orkney?

A. That is right.

Q. And you were a member of the firm of Hargraves and Orkney, insurance agents of Yakima?

A. That is right.

Q. And you have been engaged in the insurance business about how many years, Mr. Orkney?

A. Fifteen.

Q. This insurance policy involved in this case was written through you as agent, was it?

A. It was.

Q. Showing you plaintiff's Exhibit 8, this little notebook and record of insurance, you prepared that and gave it to Mr. Kirkevold, did you?

(Testimony of James W. Orkney.)

A. I did.

Q. Was there any intention in doing that to make any changes in the policy limits or coverage of the policy issued by [318] the Home Insurance Company?

Mr. Velikanje: I am going to object to that as to what his intent might be.

The Court: Oh, he may answer. Objection will be overruled.

A. Well, the reason this was issued was merely as I recall, that is Meryl Kirkevold told me that he did not understand exactly what he had in coverage, because he would allow his premiums to run behind on certain coverages, and frequently I would go over and ask him for them, and as I recall, the reason for this being issued was because he wanted to know what he had.

Q. You have not answered my question. I say, in preparing and giving him that, was there any intention on your part to make any changes in the policy limits, or the nature of the coverage under any of his insurance policies?

A. No, there was not.

Q. Showing you defendant's Exhibit A, this is the application under which this insurance policy was issued, is it, that is involved in this case?

A. Yes, it is.

Q. It was prepared by you in Mr. Kirkevold's presence, was it?

A. Yes, I am quite sure it was in his presence.

Q. He has testified that in two places it contained

(Testimony of James W. Orkney.)

his [319] signature, and I will ask you whether that is your signature on the back of it.

A. That is my signature.

Q. Yes. Did you discuss the matter with him at the time that you prepared and he signed the application?

A. Well, the reason this application was prepared and the policy issued, it was previously in another company and they could not handle that large a capacity, and whether or not I prepared this in his presence I would not be able to say, but I do know that he signed it.

Q. He signed it in your presence, did he?

A. Yes.

Q. I noticed that it states in here in storage as to the limits in storage enclosure, \$100,000. Outside storage enclosure, \$10,000, and that figure \$10,000 appears to have been changed. Did that originally read \$5,000 or some other figure?

A. Well, I think it must have. I can't recognize whether or not that is my writing. It must be, but—

Q. What conversation if any did you have with Mr. Kirkevold at the time as to the amount of that figure. That is, did you make any suggestion to him or was there any conversation about that?

A. Well, I am sure this policy—the reason I can't be too sure of this is because I have not had it daily since [320] the time of the loss, but I am sure this policy was originally written \$5,000 outside of storage enclosure, or whatever it reads,

(Testimony of James W. Orkney.)

the rest of the store, because later I know I raised it to ten thousand.

Q. Frankly, I will show you the policy to refresh your recollection. I rather think it was ten thousand when that policy was issued. Will you just refresh your recollection on that?

A. You are right, it undoubtedly was. The previous policy then, at the time this was written.

Q. Did you make any suggestion to Mr. Kirkevold as to increasing that figure from the five thousand to the ten thousand? A. Yes, I did.

Q. Tell us what was said about that.

A. Well, naturally, I can't remember the words, but——

Q. The substance of it.

A. As I recall it—you can tell I am not too fresh, because I thought I raised this policy, but as I recall it, I suggested that the coverage be raised to ten thousand. The cost of the insurance would not be any extra, and he was starting to handle more expensive coats, and had increased the amount of work on fur coats that he did.

Q. You say you made that suggestion, and what did he say? [320]

A. Well, I couldn't testify to that. I know he raised it, that is all I know.

Q. Anyway, he consented to making that ten thousand?

A. To give a better explanation of that, I had Mr. Kirkevold's insurance in two locations prior to Barnes-Woodin, and at those locations he did have

(Testimony of James W. Orkney.)

the five thousand, and when he moved to Barnes-Woodin his business developed—increased.

Q. And in any event he consented to that figure being ten thousand and the policy was issued that way? A. That is right.

Q. The policy was issued—was it issued by you here, or was it issued at the Seattle office of the company?

A. Well, the policies were never issued by us, these type of policies.

Q. Inland marine policies, you have no authority to issue policies of that nature?

A. No, I have not.

Q. They are issued at the Seattle office, you say?

A. This particular company, they are issued at the Seattle office. I could not swear on the Bible to that, but I am sure they are.

Q. Anyway, they are not issued here?

A. No.

Q. In the preparation of that application, Mr. Orkney, did [321] you write down anything but what was satisfactory to Mr. Kirkevold in accordance with his desires to the best of your knowledge?

A. Well, no.

Q. Beg pardon.

A. I don't believe there was any objection to anything. I would, if you want a conclusion I have made here, I probably had the previous policy at five thousand and started to issue this at five, and raised it to ten at the time I made this out.

(Testimony of James W. Orkney.)

Q. And so far as you know, was everything in the application satisfactory to Mr. Kirkevold?

A. Well, yes. I can't say he read it over carefully or anything of that sort, because very few policy holders do.

Q. When the policy was issued—or strike that. When you received this application, I take it you sent it into the Seattle office of the company?

A. That is right.

Q. And then they returned the policy to you within a few days?

A. Well, they returned it to me, I couldn't say whether it was a few days or when.

Q. Later, they returned it to you, and then——

A. That is right. [322]

Q. And, on—at least within a month or so after the application, you delivered the policy to Mr. Kirkevold, did you?

A. I am sure it was in that length of time.

Q. And Mr. Kirkevold, so far as you know, has never expressed any objection to the method to which you prepared the application, has he, to your knowledge?

A. No, those things are written one day and forgotten the next.

Q. But, you do not know of any objections that were made? A. No.

Q. Do you have any personal knowledge, Mr. Orkney, of any changes having been made in the Barnes-Woodin Fur Department after this policy

(Testimony of James W. Orkney.)

was issued and the application sent in, until the time of the fire? A. Say that again.

Q. Do you have any personal knowledge of any changes having been made in the Barnes-Woodin Fur Department after the issuance of this policy, and before the fire?

A. Well, I couldn't say either way, because this Fur Department changed hands several times during the time I had the insurance on it.

Q. Of course, you understand, I am referring to after Mr. Kirkevold took it over, which the testimony shows was in March, 1942, and this policy was issued in August, [323] 1942.

A. Well, that is why I can't remember just when the changes occurred, but the previous people who ran that department had a desk out in the sales room right next to the stairs in the corner of the railing, and just when Mr. Kirkevold changed that desk, I don't know, but later he had no desk there. That is the only change.

Q. Do you remember, Mr. Orkney, whether after the issuance of the policy there was any partition built in here, along here—along the front edge of the mezzanine?

A. I have to get my bearings on that.

Q. This is the front of the mezzanine. These are the steps going up into the mezzanine floor, and this is the sales room and this the work room, and this has sometimes been referred to as the catwalk along here, and referring to that line marked w. and

(Testimony of James W. Orkney.)

p., do you recall any partition having been built in there after the policy was issued?

A. I couldn't—frankly, I didn't even remember there was a catwalk along here. I know this was open. This was railing.

Q. When you say "this," that refers to the front part of the sales room?

A. I know from here, to here (indicating) it was railing, from here to here.

The Court: Speak a little louder. [324]

The Witness: I say, I know from here to here was railing, but from here over to here, just when that changed if it did change from a railing to a wall, I couldn't say.

Q. Do you recall any change having been made after the issuance of the policy and before the fire, as to where fur coats were kept temporarily waiting to be worked on in the work room?

A. Well, prior to the time Mr. Kirkevold took over, I think they were along here (indicating). I wouldn't be positive, because originally—

Q. Frankly, we are only concerned with that one, if that was there.

A. Well, you are asking me if they were—where they were stored at the time the policy was issued.

Q. No, I am asking you where fur coats were kept temporarily while they were waiting to be worked on, at the time the policy was issued.

A. Well, I know there were—or it was the practice to have two or three or possibly more in this area where they work on them. I think they also have a table here (indicating).

(Testimony of James W. Orkney.)

Q. That is the part that is marked here "work room?"

A. I know there were from one to three girls or women working on coats, along here, and I know the coats they [325] were actually working on were here (indicating).

Q. When you say "here," you refer to the part marked "store room?"

A. This much, I am sure of here, because that is the part used by the previous operators.

Q. And to make the record clear—

A. As to whether they were kept here at the time time of the issuance of the policy, I can't say.

Q. To clarify your other answer, and to make the record clear, when you say "here," is that the part marked "opening" there?

A. That is marked—

Q. Is that the part you were referring to?

A. Well, I think this door is in the wrong place, or the opening—whatever it is, I think it was a drape there, as I recall it the opening was right here (indicating).

Q. That is, you would say it is a little closer to the foot of the balcony?

A. Yes, and the work room as I would classify it, was up to the edge of this door, there (indicating).

Q. Well, this part marked w. t. here, towards the front of the balcony, was not that being used for work room purposes?

(Testimony of James W. Orkney.)

A. There was a table there during some of that time. Now, I may sound very forgetful, but when you have got four different operators of a fur room that you are trying to [326] think back on, why, I can't be too sure. I know there used to be a work table right in there, or a table——

Q. Now, when you say, "right in there," are you referring to the "w. t." that is closest to the bottom of the map?

A. Uh-huh. Well, I suppose——

The Court: Well, there is really no dispute on those features of the case, as I understand it.

Q. Now, do you remember whether or not Mr. Kirkevold in 1942, used the part that is marked "store room" for keeping fur coats that were waiting to be worked on?

A. Well, you say in 1942?

Q. Yes. In other words, the policy was issued in August, 1942, and I am referring to along that time.

A. I couldn't testify whether he kept any coats back in there. I think—I wouldn't be positive, but I think Barnes-Woodin had some miscellaneous things stored in here, but as to—well, I am quite sure he didn't have any back in here. I am indefinite about it, though.

Q. You have stated a few minutes ago that you had no authority as agent to issue policies of this nature. Did you have any authority as agent to make any changes in any important respect in the policy of this nature that had already been issued, such as the policy limits, or anything of that kind, or——

(Testimony of James W. Orkney.)

Mr. Velikanje: I am going to object to that, [327] Your Honor. I don't see that it is material. I don't believe an agent would have a right to testify to his power of agency where he is testifying against a third party.

The Court: Oh, he may answer. I don't want to spend much time on that.

A. I didn't have any authority to make important changes. I can't change the terms or conditions of a policy. I have authority to bind up to a small limit.

Q. When you say "bind," that is just a temporary——

A. Immediate protection.

Q. Mr. Orkney, did you ever examine the receipts or the copies of the receipts that were kept by Kirkevold with reference to fur coats?

A. No, I possibly have seen one lying on the table, but I never examined them.

Q. That was not part of your duty or work, was it, to make an examination of those?

A. No, I would not say so.

Q. Did you ever have any knowledge of any kind, Mr. Orkney, prior to the fire, that any of these receipts had been issued by Kirkevold or his employees without showing on the receipts the valuation of the fur coats?

A. Did I have any knowledge?

Q. Did you have any knowledge of that having been done? [328]

A. That he issued them without showing——

Q. Without showing a valuation on the receipts.

(Testimony of James W. Orkney.)

A. No, I did not.

Q. You did not, and did you have any knowledge at any time prior to the fire that in some instances certificates were issued for one amount and receipts issued for the same fur coats for different amounts? A. No.

Q. You are not connected with the Home Insurance Company at the present time, are you, Mr. Orkney?

A. I still have possibly two outstanding policies.

Q. You have no personal interest in this matter one way or another, have you?

A. No, I am really between both sides here.

Mr. Hutcheson: That is all.

Cross Examination

By Mr. Velikanje:

Q. Mr. Orkney, as to the certificates, didn't Mr. Kirkevold discuss with you several times wanting to know why they had to be listed in his monthly report? A. That is right.

Q. And weren't you advised that he fixed a maximum on those of \$200 when the certificate might be over that, and that is what he reported? [329]

A. Well, I don't recall that.

Q. But, you were advised of the fact that his monthly report did not necessarily show the amount of the certificate that he had listed, isn't that true?

A. Well, I know that he always included the value of the certificates in the amount he reported to the company.

(Testimony of James W. Orkney.)

Q. He included the amount of the certificates?

A. In the total value he reported to the company, each month, that is.

Q. And paid a premium on that?

A. That is right. He often asked me why that was necessary.

Q. Then, he paid an additional premium for the issuance of the certificate, isn't that correct?

A. That is correct.

Q. In other words, he paid premiums twice on those certificate policies?

A. That is the way.

Q. You took it up with your company, did you not?

A. I asked them why it was necessary to include the value of the certificates in the total value for each month.

Q. And what was their answer?

A. I have had to do that for every furrier I have insured.

Q. Did they ever give you a satisfactory answer?

A. Not satisfactory to me. [330]

Q. Then, on those certificates, Mr. Kirkevold paid a premium when they were written?

A. He paid a premium on each certificate that was issued, based on the value of the certificate.

Q. Then, if that coat was in his possession at the time he made a monthly report, he paid you another premium on that coat?

A. That is right.

Q. Were those premiums the same?

(Testimony of James W. Orkney.)

A. Well, no, the value he reported at the end of each month is on a monthly rate, and that is set by the company, and the rate paid on the certificates is just a standard rate, so much for each hundred dollars as shown on the certificate.

Q. Did he also include on the reports, the coats that he had there for repair? A. Yes.

Q. You know that?

A. Well, the reason I am sure of that is because quite often I would have to come over to him and get those reports, and several times I have been there when he opened his book and took the total taken in for that month, less what he delivered to the customer. That is why I know he reported everything that he had.

Q. In other words, you helped him make some of his reports? [331]

A. Well, if you would call my watching him take the total down, yes.

Q. Did you see his receipts where he took some of those amounts off of?

A. No, he had everything listed in a book.

Q. In a book. He had discussed with you, however, his receipts that he issued to customers, had he not?

A. Well, I think so, in a general way. I can't say definitely what the discussion would be, but—

Q. You never advised him his receipts were not sufficient, or anything? A. No.

Q. How often were you at Mr. Kirkevold's shop?

(Testimony of James W. Orkney.)

A. Well, I would go up there fairly often until he started working on the farm. From then on, as I recall it, his brother, Earl, took over—or I think I was a little late. At any rate, I did not go up so often from then on.

Q. When you say you were up there often, once a week? A. Oh, no, once a month.

Q. Would it average once a month?

A. No, I would not say that often.

Q. During those visits up there, did you see fur coats stored in the back part of this room?

Mr. Hutcheson: That is calling for a conclusion.

Q. Did you see fur coats hanging on racks in the back of this room?

A. Well, I believe the last year, prior to the fire I saw some there.

Q. Did you ever advise him as to his coverage under his policy, whether it was a store room? Was that ever discussed with him?

A. No, it was not.

Q. Did you ever report to the company that he had put that room in there?

A. No, I did not.

Q. Where has this application been since Mr. Kirkevold signed it?

A. Well, this is the original application that was sent in to Seattle, my copy I don't have.

Q. Mr. Kirkevold didn't have a copy of it?

A. No, no. Well, ninety-nine times out of a hundred, or nine hundred and ninety-nine times out

(Testimony of James W. Orkney.)

of a thousand, I make a copy and keep it in our office, and attach it to the daily——

Q. But you don't have any——

A. The only copies of that would be on my daily, and one sent to the home office.

Q. Mr. Orkney, isn't it a fact that you made this up and just asked Meryl to sign it? [333]

A. That is right. Whether or not I did it in his presence or over in the office, I can't swear.

Q. You did not get this information necessarily by him, you just took it down by visiting the place.

A. Well, this information here, I would have—I already had that. I can't tell you whether I checked it over or,——

Q. In other words, you just told him, "here is your application. I will get you the fur policy and sign it."

A. Well, I couldn't testify to that. Naturally, I don't know whether I made it up in his presence or over in the office. I did have him sign it.

The Court: Well, if you made it at the office, did you have some data that you were following?

The Witness: Yes, you see I had another company's policy on this risk prior to this.

The Court: That you had written for someone in a previous occupancy of these premises?

The Witness: The way that came about, I had Mr. Kirkevold's insurance when he was in for himself, across the street, and in another building. As I recall it, I transferred that insurance over to Barnes-Woodin, and I believe the insurance that

(Testimony of James W. Orkney.)

was already in Barnes-Woodin was dropped. You see, I had both locations [334] at the same time, for the previous operator of this location.

Q. That is where you secured some of this information, from your previous records?

A. Well, I can't—

Q. That is, I say if it was made up in your office.

A. Well, it was made up in my office and it came from the previous policy—my previous application. Otherwise, it came—

The Court: Well, did you ever go up and look over these premises before you took the application—before you took the policy—before you delivered any policy.

A. I inspected his—well, I suppose what you would call his vault there. At least, that storage—

The Court: That is, before you took the application.

The Witness: Well, when it was originally put in there by the previous owner I went all through it with him, and told him what he had to do and what he did not have to do in order to get the insurance. That is Lee Jackson, who used to operate it, as I have been in this enclosure with Mr. Kirkevold, because I recall that he put gas in there, and had a fan in there, but as to whether or not it was done at that particular time I couldn't say.

The Court: That is where he had the summer storage on the second floor?

A. That is right.

(Testimony of James W. Orkney.)

The Court: But, when he had the garments hanging on racks in the mezzanine floor, did you ever check that with him?

A. I have gone into the location there any number of times.

The Court: Was that after this partition had been built up?

The Witness: Which partition is that?

The Court: The one that has been described here by various witnesses.

Mr. Velikanje: The testimony was that Mr. Kirkevold built this partition in here in 1943.

The Witness: Well, I can't say whether he did or did not.

Q. But, you were back in these premises after '43? A. Oh, yes.

The Court: Well, did you discuss with him then, any questions as to the company liability or his coverage?

The Witness: No, the only question as to the coverage was in this inclusion of certificates and the values at the end of each month.

The Court: That was the only discussion you [336] had with him?

The Witness: That is the only one I can recall.

Q. You never discussed with him what the word "storage" meant or "storage room?"

A. No, we never went into it.

The Court: Did this business of his increase—have a tendency to grow after he went in?

The Witness: Very rapidly. I don't know what

(Testimony of James W. Orkney.)

you would classify very rapidly, but to the extent that I had to change companies. You see, I had him in another company up till the time this policy was issued, and I had to make a change because I couldn't handle the capacity. They had other insurance in the store, but prior to that they could have.

The Court: Now, when the premiums were paid, they were paid on a monthly basis, depending upon the amount of merchandise he had on hand for his various customers, is that correct, though generally they were paid on a monthly basis?

The Witness: That is right.

The Court: The premiums fixed in the policy is a contingent premium, rather than a flat premium?

The Witness: That is right, the rate is steady, but the payment changes. [337]

The Court: Were they paid to you?

The Witness: They were paid to me.

The Court: Would he come over and pay them or would you mail him a bill, or how?

The Witness: Well, the company supplies a pad of forms, and on it it shows a blank for the total valuation, that rate so and so, and a place for the premium, and he figured that out and marks it down and signs it and he would attach his check, sometimes, and sometimes that would come in without it, but at any rate when that would arrive at our office we would put through a bill on his account

(Testimony of James W. Orkney.)

for that amount, and then send it on to the company.

The Court: I think that is all I have.

Q. Mr. Orkney, I hand you plaintiff's identification 14. Is that the form you had him fill?

A. That is right.

The Court: I do have another question. I want to ask in connection with those. What was your compensation out of this insurance contract?

The Witness: It is a commission.

The Court: Based upon each month's payment of premium?

The Witness: The commission is based upon the [338] amount paid in by Mr. Kirkevold.

The Court: Monthly?

The Witness: That is right.

Mr. Velikanje: We offer this in evidence.

Mr. Hutcheson: No objection.

The Court: It will be admitted.

(Whereupon, form referred to was received in evidence and marked plaintiff's Exhibit No. 14.)

The Witness: We put it on a monthly report to the company at the end of the month. We would pay them that amount, less our commission.

Q. Mr. Orkney, isn't it a fact that you were handling all of Meryl's insurance?

A. That is a fact, I believe I was, anyway.

Q. Didn't he rely on you to write the necessary insurance?

(Testimony of James W. Orkney.)

Mr. Hutcheson: Oh, that is objected to, if the Court please.

The Court: I think that probably calls for a conclusion of the witness.

Q. Mr. Orkney, in the writing of this policy, was there any difference of premium on the amount outside of the storage and the amount in storage rooms, as designated [339] here by hundred thousand and ten thousand?

A. There is only one rate specified on the policy.

Q. Now, if for example this amount outside of storage room had been twenty or thirty thousand, would there have been any different rate that would have been charged?

A. I don't believe so. I have increased those on various policies with no change of rate.

Q. And when this monthly report went in, where it said daily customers, is that where it was to have been filled in?

A. Well, he would fill in the amount here, the rate so and so, and he would show the premium, and then he would sign it and date it.

Q. But, that was a rate charged on all of the coats that were in his possession, irrespective of what they were, isn't that correct?

A. He paid that rate on everything in his possession, to the best of my knowledge. I don't know whether that answers your question or not.

Mr. Velikanje: I believe it does.

The Court: Is that all, now?

(Testimony of James W. Orkney.)

Mr. Velikanje: No, I have a couple more questions.

Q. Did Mr. Sinclair ever discuss with you at the time he was [340] negotiating on this matter the question of storage or the ten thousand dollar feature? I am not speaking of Mr. McKinley, I am speaking of Mr. Sinclair.

Mr. Hutcheson: That is objected to. I don't think that would prove anything, the conversation between the agents of the company.

The Court: I think I will sustain the objection. Now, it seems to me the only purpose it could be to impeach him, and he has not laid any foundation.

Q. Did you ever discuss the ten thousand dollar feature between Mr. Sinclair and Mr. Kirkevold when the three of you were there?

A. I don't recall any time that the three of us were together.

Q. Did Mr. Kirkevold ever come to you and ask you to date back on his policy or increase it back?

A. Oh, no, I think I know what you are referring to. I listened to the testimony this morning. Mr. Kirkevold after he found out that the ten thousand was the limit Mr. Sinclair said he was entitled to, called me and asked me if I could influence the company to pay him above that, and I said I would certainly do my best, and I called the Seattle office and I supposed the term "put the pressure on" is the right term, to the extent that the manager of the Seattle office and the special agent who called on me [341] from time to time,

(Testimony of James W. Orkney.)

both came over in regard to this loss. I believe they talked to Mr. Sinclair.

Q. Well, Mr. Kirkevold wanted to know if he—if that room upstairs didn't come under the hundred thousand, wasn't that what he wanted to know?

A. I don't recall his asking me that. He never at any time tried to get me to do anything wrong with the policy.

Mr. Velikanje: That is all.

Redirect Examination

By Mr. Hutcheson:

Q. Mr. Orkney, have you ever known of a policy of this nature that was issued by this or any company in the amount of the coverage in storage vaults and safes, wasn't very greatly more than the amount of coverage outside of the storage room vault and safe? In other words, isn't it the custom and practice in this kind of science to have the coverage in such places much more than the coverage outside?

A. Yes, all of those I have read, and I am not familiar with what other people have written, but the coverage of inside storage is much greater than outside.

Q. Do you have any personal knowledge, Mr. Orkney, as to whether these monthly reports were, in cases where certificates were issued, whether in arriving at the total, [342] was that based on the amount of the certificates or the value on the release—I mean, I don't mean value on release. I mean

(Testimony of James W. Orkney.)

value on the receipts. Do you have personal knowledge of that?

A. Well, the only thing I know is that this book, at least from what I knew, this book that he had listed, I wouldn't know whether it was a certificate or the receipts that he listed—showed a value for each coat that he had in his possession, and that was totaled and that was the amount used each month. If that total was anywhere near the hundred thousand limit, or—I am referring to that coverage there, then he would raise that amount, and that has been the practice before and since.

The Court: You mean, he would raise his coverage by getting a rider put on his policy?

The Witness: I believe, if you inspect that policy, you will see that it has been raised.

Mr. Hutcheson: Yes, it has been raised subsequently.

The Witness: That monthly report came near that limit, then that limit was raised.

Q. Prior to the fire, the monthly reports never were as much as a hundred thousand dollars, were they? [343]

A. Prior to the fire?

Q. Yes.

A. Well, I am not positive.

The Court: I think they were, Mr. Hutcheson. The rider here, so you may have this, December 28, 1943, taking September and October, \$116,000. Now, that may be too much.

The Witness: Well—

(Testimony of James W. Orkney.)

Q. \$116,000, is that a total for the two months, Mr. Orkney?

A. That is the total for the two months, I believe,
The Court: Yes.

The Witness: I believe the previous policy to that would show the increases, because he did increase from time to time.

Q. The monthly report that was sent in, merely had the total, it did not give the items, is that correct?
A. That is correct.

Q. Now, the expression was used a few minutes ago that Mr. Kirkevold paid an additional premium for the certificates. As a matter of fact, that additional premium where a certificate was issued was paid by the customer to Kirkevold, and then he in turn paid that to you, is that correct?

A. Well, he paid it to me. I presume he charges the [344] customer.

Q. That is your understanding. In other words, the cost of the certificate did not come out of his pocket, did it?

A. Well, I couldn't say to that. The furriers often include storage and insurance in one lump sum. Now, if I was a furrier I would collect, but——

Q. Well, were any of these certificates issued to a customer who did not pay an additional premium for them?
A. I don't know.

Q. The issuance of the certificate was just outside of your work, is that right?

A. We left the book of certificates with him.

(Testimony of James W. Orkney.)

Q. Yes.

A. And whenever he issued a certificate he would send us the various copies of that certificate.

Q. The certificate, insofar as they were issued, were issued by him or his employees, and not at your office, is that correct?

A. That is right.

Q. The advantage of the certificate for the customers, is that it covers, regardless of the location of the coat, is that right?

A. The certificates, as far as I can interpret it, covers practically all risk, anywhere, with no exclusion, except while actually worked upon by a furrier. [345]

Q. The certificate premium to the customer was at a somewhat reduced rate, cheaper than it would have been if he had taken out an independent policy?

A. Well, even that is variable. It is in some companies and in some companies not.

Q. In this instance, it was cheaper, wasn't it?

A. I think possibly it was, but I would not say without checking the rate book.

Q. Mr. Kirkevold, for a matter of at least several months before the fire, was out at his farm, wasn't he, as far as you understood, most of the time?

A. I think he was.

Q. And during that period, after he started farming and during a period of several months before the fire, you did not have occasion to go to the Barnes-Woodin Company, did you?

(Testimony of James W. Orkney.)

A. I don't just recall when his brother came in and took over but——

Q. Well——

A. The only occasion I would have to go there would be the lady who testified this morning, I believe who had charge of the sales—I am not too positive at that time, but——

Q. The testimony is undisputed that his brother entered the army December 1st, 1943.

A. His brother entered the army. [346]

Q. Entered the army, yes, so from that time, after his brother left until the fire in May, 1944, were you in the fur department at all?

A. Well, I saw his brother over there quite often.

Q. I say, after his brother left the previous December, before the fire.

A. I would go over. The woman or lady who took over during the day, or tried to take over as much of Meryl's work as possible——

Q. Mrs. Hawkes, is that?

Mr. Velikanje: No, Mrs. Stevens.

The Witness: Well, I don't know which is which.

Mr. Velikanje: She is the woman that testified this morning.

The Witness: Yes, I would see her. It seemed to be two more or less in charge, one seemed to do the repair work and Mrs. Stevens did the sales work, and she was the one I would contact.

(Testimony of James W. Orkney.)

Q. Were you there very often during that period?

A. I can't say. I know it was several times, is all I can say.

Q. Did you ever have—of course, I realize you are not a furrier, Mr. Orkney. Did you ever have any knowledge that the value of the fur coats on the mezzanine floor, [347] of the customers fur coats on the mezzanine floor, was more than ten thousand dollars?

A. Did I ever have any idea?

Q. Yes, any knowledge that the total value of the fur coats of customers on the mezzanine floor before the fire was more than ten thousand dollars?

A. No, I did not. The matter of fact is, I didn't know what the value was there.

Q. Did you have a policy—a customer's fur coat policy covering Kirkevold during the period from August—or from March, '42 to August '42? The testimony is he moved into this location in March '42.

A. Well, as soon as he moved I had his insurance there.

Q. And until August you were the agent, but it was in another company, is that right?

A. It was at the time this policy was written. It was in another company.

Q. So, you did have information in your file that Mr. Kirkevold had given you previously with reference to his place of business when you wrote this application in August, 1942, is that correct?

(Testimony of James W. Orkney.)

A. I must have had.

Q. Yes. You as agent for other companies that you represented, you were still writing insurance for [348] Mr. Kirkevold in the Barnes-Woodin Fur Department weren't you?

A. When is that?

Q. Right up to the present time. A. Yes.

Q. In other words, the policy of this nature that they have now, you wrote for him in another insurance company that you represent?

A. Effective May, '45, I think.

Q. Yes.

A. I placed it in another company.

Q. And it is still in effect? A. Yes.

Q. Is that right? A. Yes.

Mr. Hutcheson: That is all.

Mr. Velikanje: That is all.

Mr. Hutcheson: We rest.

The Court: I think we will take a short intermission now.

(Recess.) [349]

MERYL KIRKEVOLD

resumed the stand for further examination and testified in rebuttal as follows:

Direct Examination

By Mr. Velikanje:

Q. Mr. Kirkevold, in your discussions with Mr. Sinclair did you ever discuss with him the limitations of this ten thousand dollars? A. No.

(Testimony of Meryl Kirkevold.)

Q. Did he ever advise you you were limited to ten thousand dollars on the policy? A. No.

Q. He never advised you of that fact?

A. No.

Q. When were you first advised of that fact?

A. I think at the time that the Home Insurance Company gave us—or wanted us to sign half the releases for the five thousand. I think that is what it was.

Q. Well, wasn't it when Mr. McKinley came into the picture? A. Yes.

Q. Mr. Sinclair never advised you of that fact?

A. No.

Q. Did you ever ask Mr. Sinclair to redate the policy or rewrite it in any way? [350]

A. No sir.

The Court: I don't think there is any issue.

Mr. Hutcheson: No, we did not contend that.

Q. While you were working on your ranch, were you still in charge of your fur department?

A. Oh, I had a lady in charge to supervise it.

Q. And were you living in town at the time?

A. Yes.

Q. Would you work nights? A. Yes.

Q. How about Saturdays and Sundays and so forth?

A. We had Saturday afternoons off.

Q. Were you in the store during those times?

A. Saturday afternoons I usually came in.

The Court: I wanted to ask you a question. When a customer brought in a fur coat for cleaning

(Testimony of Meryl Kirkevold.)

and repairs and alterations and so forth, did it go through the same process, insofar as time was concerned, from the time it came into your hands and was delivered back to the customer, to remodel or refinish or the cleaned product?

The Witness: Yes, it did.

The Court: And when you had cleaned it or repaired it, or whatever you did with it, then where would you put it? [351]

The Witness: You mean, was it a finished garment then?

The Court: Where would you put it?

The Witness: Well, it would be——

The Court: Until the customer came and received it, I am trying to get clear in my mind the distinction if there was one, between the coats you took for summer storage or a longer period of time, and the coats you took for repairs and alterations?

The Witness: Well——

The Court: Would you take it up on this second floor?

The Witness: No, that would hang on the mezzanine.

The Court: Well, where?

The Witness: In the storage room, in the back.

The Court: That is what I wanted to get cleared up.

Mr. Velikanje: That is all. We rest, your Honor.

(Witness excused.) [352]

Mr. Hutcheson: We make a motion for default to the third party defendant Dorothy Riggs.

The Court: Your motion will be granted.

Mr. Hutcheson: We rest.

The Court: I want to shorten this argument as much as possible, and not have counsel spending a lot of time on matters that are already fairly clear in the Court's mind, and for that reason probably I might make some suggestions that may be helpful to you.

I appreciate the issues as made here. The major issue of course is the first one that was set forth in the order made by this Court in a pre-trial hearing. That was the question of liability of the defendant Home Insurance Company under the terms and conditions of the insurance policy being a question of liability under the ten thousand dollars or the hundred thousand dollar protection to be determined by the evidence and facts.

The second, as to the liability of the defendant Home Insurance Company based upon the individual floater policies—that is, as to whether said policies are under policy limitations, and if there are such limitations whether they are in addition thereto. [353]

Third, actual amount of loss dependent upon the value of the coats destroyed, parties to be limited in proof of valuations by not to exceed three expert witnesses. That is not material here now.

Liability of third party defendant Dorothy Riggs, and her claim. That has been disposed of by the oral motion that the Court has just granted.

The question as to whether or not interest should run on any amount of recovery, and this last one is more nearly a matter of law than it is one of fact. I shall have no difficulty with that question, I think, and the question covered by 2, liability of the defendant Home Insurance Company based upon the individual floater policies—or in this case they have been referred to as certificates. My mind is fairly well made on that issue, and there is no serious dispute about the amount of loss dependent upon the value of the coats. I am of the opinion that the plaintiff, if it is entitled to recover on the other issues raised here, is not entitled to recover a profit to be made in substituting a new garment for a used garment, but his loss would be measured by what this garment cost him in the matter of replacing it, rather than what the profit would have been if he had made a sale on the open market, and [354] the other items of loss are not—there is not a serious dispute. It seems to me that without attempting to analyze the ten or twelve that are here involved, I think where there was no value placed upon the receipts, and as to what the value was, the testimony is not sufficiently in dispute here to raise an issue in the mind of the Court that it would be other than that that was fixed by the plaintiff himself as he went through those seven or eight items. I think it runs somewhere from a hundred and fifty to two hundred dollars, excepting where they had these so-called certificates out, and my finding would be in that sum as to them, but I do want to hear from you, Mr. Hutcheson, on this first issue

because, unless there is law from cases that are quite on all fours with the case here—and I don't mean to ask you to go into the many, many insurance cases we have, because they are legend, my disposition is to hold that the definition of the term "storage" is one that must be given a liberal construction in favor of the plaintiff, under the general rule of law that an insurance policy must be liberally construed in reference to the one who buys the protection, and is strictly construed against the insurance company who writes the policy. I will hear from you first, Mr. Hutcheson, and based upon [355] that—and I have given you these suggestions so that you can confine your argument rather than ramble all over on matters that I might have already disposed of in my own mind.

(Whereupon, argument by respective counsel.)

The Court: Mr. Hutcheson, the Court has allowed quite over an hour in your total argument, and I just do not feel that to go farther would be of any great assistance. I think I am prepared to make a disposition of this case by omitting certain minor features of it.

I am satisfied that the case would never have been brought into this Court, or any other Court if liability had been admitted by the insurance company on the hundred thousand dollar phase of the policy. The parties would have gotten together on all of these minor details, and the case therefore turns in large measure upon that feature of the policy. From what the Court has said, it is

evident to all parties, I am sure by now, I shall and do determine that this hundred thousand dollar provision of the policy was one that covered the various fur articles in the room on the mezzanine floor that has been at times [356] referred to as the storage room by the plaintiff, and at times referred to as the work shop by the defendant. I think that I should, for the benefit of an Appellate Court if it is seen fit to take this case to an Appellate Court, state briefly my reasons. In so doing, I must refer to the cases cited by the defendant in an able manner which show an exhaustive research and unusual industry. Many of them are not at all in point in defining the term "storage rooms" as found in this contract of insurance, because they deal with the enforcement of criminal laws and ordinances. The construction placed upon words and phrases and sentences in a criminal statute, is an entirely different construction from that, which would be placed upon a policy of insurance, and particularly a policy of insurance such as we have here, and more particularly upon this policy by reason of its background and history.

The representations, whatever they were, whether direct or otherwise, by Mr. Orkney are binding upon the defendant company here, and I take that position in making a disposition of this case. There is one feature of it that makes it comparatively simple for the Court to dispose of, which is that there is no remote claim or suggestion that there was anything [357] dishonest, fraudulent, deceitful, or any misrepresentations of any kind made by the

plaintiff in securing the insurance, and the Court, after observing the plaintiff upon the witness stand and hearing his testimony, and noting the answers that he made both on direct and cross examination, is convinced that he is a man of high character and good reputation.

The contention, made for the first time here, that there was only a limited liability on this policy after the loss had occurred, coming from the two witnesses who represented the insurance company as adjusters, indicates that both acted in good faith, but after all presented only their opinions, and can not be binding upon the Court. In fact, the record would seem to indicate that the first of these adjusters did not even raise the issue as to limited liability, though there might be some inferences from his testimony that he intended to, but at any rate when the second adjuster—I think it is Mr. McKinley, took the stand and testified, he, through his own initiative raised, for the first time, this question of limited liability.

The evidence in the case clearly establishes that plaintiff had a thriving and growing business from the time of the issuance of this policy, which was a policy without time limits, but had provisions for its cancellation. The business not only grew rapidly, but the proprietors found themselves in a position where they could not care for the increased volume of business with that degree of expedition that they could before the war time, and merchandise that came into them in the way of fur coats and furs, were much longer in being processed.

Nevertheless, they assumed, and in good faith, liability to the general public in an invitation, or in many invitations, they extended by pamphlet and by newspaper advertisements and other means, to assure the prospective customers that if their fur garments were brought to them, they were covered and protected by insurance from the time they reached their hands until they were delivered back to the owners. That would not necessarily change the contents or the construction to be placed upon this contract of insurance, but it does establish to a very high degree the good faith of the plaintiffs and what were their honest beliefs.

The testimony of Mr. Orkney, the agent for the defendant, indicates to this Court very clearly that it was his conviction, even with all the familiarity that he had with the surrounding situation and conditions, that he had written and delivered, or caused to be written and delivered a policy that covered all of the various garments that were brought in here for servicing.

Now then, let me take just a few moments to consider this contract. We must always bear in mind that the contract must be liberally construed in favor of the insured, and where there is any ambiguity or any uncertainty, that must be resolved against the insurance company and in favor of the insured, because this is their own contract, written by them. It is very clear that the assured, whether through carelessness or otherwise, did not read the contract of insurance. Neither did the agent that delivered it to him. I think the record

will bear me out he said he did not even read it himself, and the application made for it, I have no hesitancy in finding it was made in the absence of the insured, based upon some previous data, which the agent had.

This policy, in giving it that liberal construction which we must, in favor of the effectiveness, to accomplish the purpose for which it was written, particularly where all parties acted in good faith, certainly covers every article that is involved in this suit. After I determined that the room where these furs were deposited in the course of processing was a storage room, it would cover these furs as well [360] as those in the vault, because this policy covers—now, I shall read its provisions, touching this phase of the case: “while in storage rooms, vaults or spaces at locations hereinafter described.” I am leaving out that provision that deals with transportation or otherwise, and I am giving the insured the benefit of the semicolon placed in this small print.

For more than two years, the agents of the company accepted the premiums and they were growing in an ever increasing amount, month by month. The business, as I have said, had reached such proportions that it became necessary after the customer left her fur coat with the plaintiff, that the plaintiff make some provision to safeguard and protect that coat, and he provided it by building a partition, moving out whatever furniture there was in the space that he referred to as a storage room, a place where these garments could be kept,

and it was for a period of a month or six weeks before such garments could be processed and he assumed all responsibility for them. In this, there was nothing but fur garments, as I interpret this testimony, coats and capes and whatever there was, and they were waiting processing to be taken to another storage room, but certainly under the provisions of this policy, under the situation that prevailed in [361] this particular case, the room on the mezzanine floor where these things were placed was a storage room, and liability to this defendant grew out of that fact. Knowledge of the defendant's local agent must be attributed to the defendant. I therefore find that the plaintiff is entitled to recover in such sum as is measured by the amount of the loss sustained on those garments that were within the mezzanine storage room or lower enclosure. The evidence is rather uncertain as to what percentage of them were in there. The plaintiff testified, I think, that he had some twenty to twenty-five per cent of the garments out in the work room. That is about all the evidence that I have in that regard. I think I shall find that his loss on a ratio basis is twenty-five per cent, to be calculated against the ten thousand dollars contract provision of the policy, and seventy-five per cent against the higher coverage of the hundred thousand dollar provision.

I have indicated that to allow plaintiff a recovery in those instances where he delivered a new garment of a value equal to that claimed by the owner of the garment lost, would be to allow him

to profit in such transactions. I further considered the matter and I am inclined to believe that I am bound to accept what constituted the market value at the time, and [362] the only evidence I have in that regard is that of the plaintiff, and I shall accept that, rather than his wholesale cost price on those articles, and in calculating the recovery to be made, it will be made on that basis.

Now, on the issue of interest, I was under the impression that interest should be charged either from the date of completion of filing of the proof of loss, or at the time within which to bring the suit, but there were, and will, it seems to me, of necessity, be numerous instances here that could not be determined until today. For that reason, I am not going to allow interest from a date other than the one when this judgment is entered, and if I have omitted in my oral statement here disposing of this matter, anything that counsel feels should be considered in order to expedite the drawing or preparing of your findings and conclusions and decree, I wish you would mention it.

Mr. Velikanje: Your Honor, there is one thing on these certificates. Are you allowing the amount of the certificate or the amount of the receipt? You see, these certificates, the certificate holders had made proof of loss on their certificates, though the amount listed in the proof of loss and Mr. Kirkevold might not have been as high, but they had made proof of loss on their certificates.

The Court: Mr. Kirkevold has taken an assignment of all of them?

Mr. Velikanje: That is correct.

The Court: And paid the amount of the certificate?

Mr. Velikanje: That is correct.

The Court: Do you agree with that?

Mr. Hutcheson: He replaced the coats, but I submit the plaintiff could not recover more than the amount stated on his proof of loss.

The Court: I am rather inclined to think your position is sound in that regard, Mr. Hutcheson.

Mr. Velikanje: The only thing is this, your Honor; if I might take a minute to remark on that, Mr. Orkney testified that the amounts they paid their premium on was the amount of the certificate value. Let's take this example, one coat I believe of Mrs. Palmer's or Mrs. Stanley, was shown in the proof of loss filed with the insurance company at two hundred dollars. Mrs. Stanley made a proof of loss to the insurance company which they admit she did make, of eight hundred dollars, and Mr. Kirkevold paid her eight hundred dollars cash which he testified was the reasonable value of that coat and he had also paid an [364] additional premium on that certificate, and then has taken an assignment of her eight hundred dollar claim.

The Court: I do not know whether your complaint covered that situation or not, I have no independent recollection now without going back to it. Generally speaking, you would be entitled to recover only the sum you made proof of loss on. Now, does somebody else have a claim against the insurance company growing out of this loss, who

assigned their claim to you, and you sue as an assignee on such claim, and prove it, then of course you would be entitled.

Mr. Velikanje: That is what has been done in this case.

The Court: It is in your complaint?

Mr. Velikanje: That is correct.

Mr. Hutcheson: I can't give the Court—

The Court: If it is, then you will recover. If it is not, you will be bound by your proof of loss.

Mr. Velikanje: I was going to refer—it says, paragraph VIII: “in addition to the amounts set forth in plaintiff’s proof of loss, several of said customers’ garments and furs were covered by certificate endorsements, being special certificate policies, covering an amount beyond that as listed under assured’s legal liability. That said customers [365] have paid an additional premium for said coverage and had filed with said company due proof of loss. That under a letter dated October 4, 1944, the law firm of Cheney & Hutcheson returned to said customers and policy holders their proof of loss with the notation that settlement would be completed with them. That the persons holding such certificates of endorsements and the amounts of loss suffered by them and shown by proof of loss under said certificate or as follows, and they admit in their proof of loss they filed under those certificates.”

The Court: I assume that was denied by a general denial. I think they are entitled to recover. Are there any other—

Mr. Velikanje: I did not get your Honor's ruling there.

The Court: I think these claims of certificate holders will be allowed under all allegations made in the complaint, and the denial of it because the proof is clear that they were certificate holders; that they paid an additional premium and the testimony is that the master policy, if we may call it that, constituted the assured, the agent of the insurance company to write these certificates.

Mr. Hutcheson: Your Honor is holding that the plaintiff can recover the larger amount on that?

The Court: On those claims where they were based on certificates, yes, and which had to be assigned to plaintiff.

Mr. Hutcheson: There is another very important question that I do not believe the Court has touched on, and that is, it is our position that as to any particular coat, they can not recover more than the valuation stated in the receipt, and that is our position, they would be limited to that in all cases, and that in cases where they wrongfully failed to write——

The Court: I think you are correct in that, excepting where there were special certificates that the company wrote special insurance and took the premiums on, then there is no proof here that it was not worth the amount that is set forth in those policies.

Mr. Velikanje: I think what he was referring to, your Honor, was some of these—there were

about four, I believe, that had no receipt amount listed.

Mr. Hutcheson: I am referring to that, and I am referring to every single one of the thirteen where there was certificates. The question runs all the way through there.

The Court: Well, the plaintiff testified [367] as to those, as well as to all of them, didn't he, as to what the value was?

Mr. Velikanje: That is correct.

Mr. Hutcheson: It is not a question of value. It is a question of policy limitation that it can not exceed the value stated in the receipt.

The Court: I shall have to hold against you on that.

Mr. Hutcheson: On what ground, your Honor?

The Court: I take the broad position now that this policy insured against loss, and when the assured makes their proof—in compliance with the provisions of the policy, and second, after litigation is instituted and the plaintiff has proven here——

Mr. Hutcheson: Your Honor, the point that I am referring to was settled by the pre-trial order "that no claim will be higher than the valuation set forth on the receipt issued to coat owners, except in the case of those coats upon which there was a separate policy with the company."

Mr. Velikanje: We are making no claim for anything beyond, but the only question that comes up is on those where no amount was listed on the receipt, but wherever an amount was listed on the

receipt, that amount has been put in our proof of loss—that amount [368] or lower.

The Court: Then do I understand there are no items where there was no value whatever placed upon it that are included in this litigation?

Mr. Velikanje: Oh, yes, there are.

Mr. Hutcheson: There are.

The Court: That is the point you are raising? Do I understand you are raising a claim on those?

Mr. Velikanje: Let us say we have taken a receipt and put a valuation of two hundred dollars or one hundred and fifty dollars on that coat. We have not claimed and do not claim anything beyond that amount which is listed on the receipt, but on the receipt where we had no value listed, then we are standing upon what the reasonable value was, or what the amount of settlement was.

The Court: But, that was testified to at the opening of the trial.

Mr. Velikanje: That was correct.

Mr. Hutcheson: Well, counsel's concession there covers all the cases, then? In other words, he agrees where there was no certificate, they can not recover more than the value stated on the receipt, so that as to those, that answers the point that I raised, but it leaves the question of the amount of [369] recovery in the cases where the plaintiff himself failed to state any value on the receipt, and I see no basis for recovery by the plaintiff at all there. In other words, if it were an innocent——

The Court: In those instances, didn't the proof of loss fix an amount?

Mr. Velikanje: That is right.

The Court: Then, was there not testimony here that the value of the article lost in the fire was of a certain amount?

Mr. Hutcheson: Yes, but they have not complied with the policy provision requiring a valuation as to each receipt in order to recover as to that garment.

The Court: I am rather inclined not to hold with you, Mr. Hutcheson, on that. I am not in the slightest prejudiced against the insurance company, but it does come with poor grace for an insurance company to draft a policy of insurance, collect the premiums, and then seek a way out by strained construction when a loss occurs, and I am afraid that is the position that you take now with reference to these particular items. They were lost. The loss is not denied by the adjuster who later came along. The liability was only denied, and based upon the fact the [370] adjuster interpreted the provision of the contract as being one limited so far as articles stored on the mezzanine floor was concerned, was the ten thousand dollar limit.

Mr. Hutcheson: We have also denied liability on both grounds.

The Court: I shall have to hold you are liable, and if I have now disposed of all those things that need to be cared for by the Court in order that you might prepare your findings why I will leave you to submit them and I am wondering if when you agree upon them—and I hope you can, if you can submit them to me in Tacoma. If you can-

not agree, of course I will just have to arrange to come back to Yakima some time. My calendar has become badly congested by reason of my absence.

Mr. Hutcheson: For my information, will Your Honor come back later this month?

The Court: No, I have no arrangements with Judge Black to come back. My designation from the Circuit Court expires on Monday.

Mr. Velikanje: I presume if need be, we could come over and see you there.

The Court: I would be very glad——

Mr. Velikanje: I think that will be the [371] arrangement if we can't agree.

The Court: Well, is there anything further to present to the Court before adjournment?

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,

Official Court Reporter.

[Endorsed]: Filed May 2, 1946. [372]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS ON MOTION FOR NEW TRIAL

Be It Remembered that on the 9th day of April, 1946, at the hour of 10:00 o'clock a.m., the above-entitled and numbered cause came on for hearing of motion for a new trial before the Honorable Charles H. Leavy, one of the judges of the above-entitled court, sitting in the United States District Court in the city of Tacoma, State of Washington; the plaintiff appearing in person and by his attorneys of record, Velikanje & Velikanje by E. F. Velikanje of counsel, and defendant appearing by its attorneys of record, Cheney, Hutcheson & Gavin, by Elwood Hutcheson of counsel; the following being a transcript of excerpts of said proceedings: [373]

2:00 o'clock p.m.

The Court: Now, you may proceed, Mr. Velikanje.

Mr. Velikanje: Your Honor please, I will try to hit the different items Mr. Hutcheson has, so if I do happen to miss any and the Court wishes any additional information on them, I wish the Court would call my attention to it.

First, as to the Belaire coat, and the Logozzo coat, our records were all destroyed in the fire, and naturally we have to rely on the information that is furnished us by the insurance company, and from that information we are willing that the Belaire coat be reduced to three hundred and twenty-five

dollars and the Logozzo coat to three hundred and fifty, or an overall reduction of a hundred and seventy-five dollars.

The Court: Are those the figures that Mr. Hutcheson mentioned?

Mr. Velikanje: They are, with this statement as to the Belaire coat. He states the Belaires did not file a proof of loss. However, I believe that is immaterial in this, that the insurance company was furnished with the certificates or copies of the certificates, and knew the amount of the claim of Belaire, and her amount was listed—at least, her name was listed in the [374] proof of loss as filed. It is true that amount was listed as only two hundred dollars, as Mr. Kirkevold's statement was the amount they put on all of these coats, when they were over that. In other words, they listed on their showing to the company each month, at two hundred dollars.

The Court: What was her certificate?

Mr. Velikanje: Three hundred and twenty-five dollars, and the Logozzo, we are advised, three hundred and fifty dollars. In other words, our overall amount is reduced then a hundred and seventy-five dollars.

(Argument continued by Mr. Velikanje.)

The Court: Well, you can very easily ascertain in a general way what his net profit was, in his business.

Mr. Velikanje: I believe that can be done.

The Court: The point is I have in mind—and

while I agree with you that the pre-trial order defining what the issues were was more limited than what the issues seemed to be after the Court had heard the evidence here, I agree with you in that regard, but we must bear in mind here that first we have a novel type of insurance.

Mr. Velikanje: That is correct.

The Court: It is one that we rarely encounter [375] in litigation. The contract of insurance contemplated that the dealer would be protected from loss within certain limitations.

Mr. Velikanje: That is correct.

The Court: But certainly never contemplated that he would reap a profit by reason of the occurrence of the contingency—that is, the fire, and then this same contract of insurance made the dealer the agent of the insurer insofar as he dealt with his customers in many instances by permitting him to write a type of insurance contract with the customer over and above the maximum liability per article, and that confuses or makes a confusing situation when we come to apply the precedence and the insurance laws in the situation we have at hand, but I was struck with—and still am, with the thought if the plaintiff Kirkevold is allowed the margin, whatever it may be on these replacements, then he has actually profited more than covering his loss. It may be, that there ought to be a distinction made between his gross profit in a transaction and his net profits, but it is inequitable to me and unjust, to tax the insurer

with a sum that is measured by a profit made to the insured, when the contract of insurance fixes as one item of, or one way of measuring what compensation should be, the replacement value, and I do not [376] think that it is assuming too much to say that when a concern as large as this insurance company couldn't have, if they had seen fit to have done so, and assumed liability for the larger sum in the policy that the Court has determined there is liability, go out and have bought at wholesale, articles that would have been in the nature of a replacement, at least in some instances.

Summing up, I cannot escape the conclusion that now to allow the full retail price that the plaintiff charged his customers as the measure of loss that the plaintiff sustained, is unjust, and not in keeping with the contract of insurance.

Mr. Velikanje: Your Honor, might I state on that it is true—I don't know, as I say I don't have the figures to know whether he has profited by this transaction or not, but let us assume that he has made a little bit by this transaction. Look at the amount he stood to lose, due to the action of the insurance company, as that exception is shown in *Corpus Juris*. They have the opportunity in this policy to go out and make settlements with the customers themselves, if they so desire. They can settle with the customers, or they can settle with Mr. Kirkevold.

The Court: Well, that is true. If we take your general statement, they had a right to contest the

[377] issue, which is not an open and shut issue at all.

Mr. Velikanje: That is right.

The Court: As to whether liability was fixed by the larger amount named in the policy or by the lesser amount, and in order to contest that issue, the delay in this adjustment came about, and they should not be penalized for that.

I am of the opinion, Mr. Velikanje, that we should, if you cannot, after a conference, stipulate as to what the net profits were in the transaction, and I can see the difficulty in getting that to an exact amount, but if you cannot do that through stipulation and agreement, perhaps I shall have to reopen the case on that issue to ascertain what that was so as to make a finding. I feel that I not only would be deciding the case on a wrong premise and misinterpretation of this contract if I render a decision that permits an actual profit by reason of the fire, on the particular items involved, and I think I would place the case in the position where it might well be reversed on that particular ground, even though the pre-trial order seems to limit it otherwise. The pre-trial order is incorporated with the whole of the case and is to be given consideration now in this motion for a new trial. That is not conclusive, because it is not an appealable order.

Mr. Velikanje: I am wondering if I might have ten days in which to submit some authorities on this other—this other theory of the case set forth in

Corpus Juris here, that where they have not set that up, and as to a determination of what cost is, whether it is cost to your wholesaler or whether it is cost to your costumer.

The Court: Well, I am willing to allow you ten days, but I do not want a lot of authorities submitted that go outside of these peculiar issues that are here involved, and this is, as I said a moment ago, a contract of insurance quite different from that that you find in the general insurance law where the assured is dealing directly with the insured, but this involves third parties.

Mr. Velikanje: That is right.

The Court: I am just doubtful if you will find any authority on a policy that construes a policy of this type.

Mr. Velikanje: I have not to date found anything that comes near it. I have looked and found other things, but as I say I would like a few days to run this down, finally, and make a determination of it.

The Court: On the other grounds, Mr. Hutcheson, that you raise, I shall have to deny the motion for a new trial. That is, the ground of—that was thoroughly [379] threshed out, as to whether or not the place where these articles were, was a storage room within the terms and conditions of this policy. I am still of the opinion that applying the liberal rule of construction to an insurance contract, and viewed in the light of the particular facts and circumstances disclosed in this case, where

the representative of this insurance company—I think his name was Arney——

Mr. Hutcheson: Orkney.

The Court: ——was at all times familiar and knew the circumstances, and I can only draw a logical inference, so it seems to me that he was fully familiar and certainly Kirkevold, the plaintiff, believed that he had his liability covered to the limitations that were fixed in the policy under the hundred thousand dollar provision as to all garments, except those in his work shop that were undergoing renovation and repairs and so forth, and as to the error claimed by reason of the admission of certain evidence, mostly documentary I think, I shall have to deny the motion, because I feel that they were in a degree, at least relevant, showing—tending to show the understanding of all of the parties to this contract of insurance in reference to liability, and certainly inviting the general public to come and deal at this place with the assurance that if the calamity [380] of fire occurred, they would not suffer any loss beyond a certain amount, and I think that takes care of the issues that you have generally raised.

I dislike to have to reopen this case for hearing on the matter of what the net loss was to the plaintiff in these replacements, and I think if I did I would be forced to the position from what has been said, of ascertaining what his net profit was at that time in his fur business—the difference between what he paid wholesale for the article and then

when he went through all of the various steps, until it reached the customer. Of course, he could not fairly and justly be made to measure his profits, because his profits are naturally somewhere between the sum that lies between the gross and the cost of doing business, and the thought lying back of all insurance, up to the limitations fixed by the contract of insurance, are that neither party should profit at the expense of the other, and certainly in this peculiar policy is that principle outstanding.

Now, if you could agree after a conference on what that sum—that net sum of profit was in these replacements, it would not necessitate a reopening of this case, and neither would it in any way prejudice your rights on appeal.

Mr. Hutcheson: I think we should attempt to [381] see whether we could agree on that fact.

The Court: And of course, if you cannot agree I will have to just let the matter go along until some time when I can get over there, or you could come over here, but I could see how if you do not agree, you might make a rather extended hearing out of the matter, but the plaintiff in this case seemed to be a man both fair and reasonable, and would doubtless make such disclosures that were necessary so you could ascertain about what he was making. I am satisfied had he handled these replacements as he did the others, by paying the amounts of the liability that he had to his customer, and the customer had gone out of his shop and come back the next day and bought a coat that was substantially

above—in value above the one they had lost, that the insurance company could not use that as a basis for minimizing their liability, but under those circumstances the customer could have gone anywhere else, also, and many of these losses were adjusted in that manner, and probably some of those same customers came back and bought coats of the plaintiff, but here, the plaintiff negotiated with the customer and agreed not only to replace it, but to make a sale of an article that was substantially higher on the market at that time. Well, he is entitled to his net profit on that article over and [382] above what it would come to if we just take the maximum of liability that he would pay. Do I make myself clear to you? The difficulty is now, if you cannot settle it—and I think you can, is that it was not a two hundred dollar coat that was lost that was replaced by a two hundred dollar retail appraised coat, but sometimes it was replaced by a five hundred dollar coat. Well, the difference between the two hundred dollars and the five hundred dollars was Kirkevold's. That was part of his business, and that is the thought that I have in mind in suggesting this matter to you, so that you can avoid falling into that difficulty.

Mr. Velikanje: If I understand you, Your Honor please, take this example of the five hundred dollar coat. Let's say that cost two hundred and fifty, just using that figure. Then, we would figure that has a loss of two hundred dollars. That is, if it was listed as that on the receipt, at two hundred dollars.

The Court: Two hundred dollars?

Mr. Velikanje: Yes.

The Court: I don't know whether I understand you clearly. If the customer would have recovered by reason of this fire the sum of two hundred dollars.

Mr. Velikanje: That is right. [383]

The Court: Even though his coat was worth four hundred dollars or her coat was worth four hundred dollars.

Mr. Velikanje: That is right.

The Court: The only liability of the plaintiff would have been two hundred dollars to the customer.

Mr. Velikanje: That is right.

The Court: But, instead of meeting that liability in money, after negotiation he sold to the party suffering the loss at retail, a coat for five hundred dollars. My thought is that his net profit on that five hundred dollar coat—assume it would be ten per cent, it would have been fifty dollars. Well, forty per cent of that was the profit he made on the first two hundred.

Mr. Velikanje: So, you would figure a loss of a hundred and seventy-five, is that the way you would figure as to the liability of the insurance company,

The Court: Well, whatever that would figure.

Mr. Velikanje: I mean, on the example you used, he had a fifty dollar—well, it wouldn't be quite that much, it would be twenty per cent on two—

The Court: It would be a hundred and eighty dollars. That is right, that is the thought that I have in mind. It seems to me that comes as near doing exact justice—— [384]

Mr. Velikanje: I hope to heaven Kirkevold has kept some records.

The Court: How many of this type of items are there?

Mr. Velikanje: I would say over half of them.

The Court: Well, he has the records. He has the records of course, of the value that they placed upon the garment that was replaced, because that is—I think that appears in these——

Mr. Velikanje: Yes, we have a record of the value—of the insurable value of that item,—of the item that was lost.

The Court: Yes.

Mr. Velikanje: Whether he has all his purchase slips and so on and so forth on the new ones——

The Court: Well, I regret that I can't——

Mr. Velikanje: Well, Your Honor, we will have to see what we can work out.

The Court: The issues are quite involved in the first place by reason of this novel type of insurance that we have here, and the defendant may well conclude that they want to take the matter to an appellate court for further consideration, and I want the record to be sufficiently clear that they are not in any way denied their right in that regard, and of course if the parties [385] could—I give this to

you as a suggestion after going through these numerous items, being satisfied what approximately constitutes the net profit to the plaintiff, and did at the time of this loss, and at the time the replacements were made without an endeavor to arrive at the exact penny, because that is going to be impossible, then, it seems to me you would greatly simplify the matter and would in no way prejudice the rights the defendant had in an appeal, but would eliminate from such an appeal the question as to whether or not that covenant in this insurance contract, with reference to replacements, has been met by both parties—but, of course if you can't agree upon that item of what constitutes net profit, then I may have to take further evidence on that and make findings in that regard, so we finally get litigation that involves a small amount of money and a large amount of litigation.

Mr. Velikanje: Well, we will try, Your Honor.

Mr. Hutcheson: We will try.

The Court: Yes, and then I shall just either leave these in the files, if you wish, or give you back——

Mr. Velikanje: You might as well leave them in the files. We have copies and if we have to change them, we can.

The Court: They are not marked filed, and I [386] do not think I will have the clerk mark them "filed." You have in them the names of these different claimants. If you have got copies of them, you would not need these, particularly. I do

think, however, any findings that I finally find, they should set up the name of each of the claimants and the amount as you have done here, because that then will take that issue out of the case so far as the lower court is concerned, and then if you will further stipulate, based upon the contingency that you will be able to agree upon a basis of calculation, that the findings and conclusions of law and so forth may be signed here. I am not going to ask you to do that if you do not care to, but it will just delay you that much longer. If you are fully agreed, I will be in Yakima, according to the present plans, to hear Naturalizations. I have just talked with Judge Black by long distance, I think very early in May.

Mr. Hutcheson: We are perfectly willing to stipulate, they may be signed either at Tacoma or Yakima, whichever is most convenient.

The Court: Very well.

(Whereupon, adjournment was taken.) [387]

[Title of District Court and Cause.]

Be It Remembered, that on the 2nd day of May, 1946, at the hour of 1:30 o'clock p.m., the above-entitled and numbered cause came on for presentation of findings of fact and conclusions of law and judgment and decree before the Honorable Chas. H. Leavy, one of the judges of the

above-entitled court, sitting in the United States District Court in the city of Yakima, State of Washington; the plaintiff appearing in person and by his attorneys of record, Velikanje & Velikanje, by E. F. Velikanje of counsel, and defendant appearing by its attorneys of record, Cheney, Hutcheson & Gavin, by Elwood Hutcheson of counsel;

Whereupon the following proceedings were had [388] and done, to-wit:

The Court: Now, this case of Meryl Kirkevold versus Home Insurance Company, are the parties ready to proceed?

Mr. Velikanje: We are, Your Honor.

Your Honor, pursuant to your ruling in Tacoma at the last time, we went into this matter and attempted to work out a schedule of these coats and actual costs, and the amount that the customer had paid, what the retail value of that was, and what the luxury and sales taxes were, and a computation on this whole matter. I have shown Mr. Hutcheson part of it, but I had not completed it the last time we had a discussion. The computation on cost of replacements figured from Mr. Kirkevold's 1945 income tax return—the 1945 income tax return we have taken 1945 because that shows a normal year. '44, during a large part of the year he was burned out—in other words, unable to do business. The coats were replaced in 1944, and therefore the replacement of some of those coats would not show a normal year's operation, so we have taken the '45 schedule, which is—an income tax return was pre-

pared by E. W. Frame, an accountant in town, and it was prepared independent of anything that had to do with this case. It was prepared before this question ever came up, and from that it shows his cost of doing business—now when I [389] say “cost of doing business,” the figure I am stating now is based on his purchase cost. In other words, a mark-up cost of doing business is 51.52 per cent. In other words, if he had a coat that cost one hundred dollars, he would have to sell that coat for a hundred and fifty-one dollars and fifty-two cents to break even, based upon his costs without any consideration of any profits for himself or anything for what he has done in the matter.

We then took the amounts as shown on this purchase price of the coats, the material—the actual material for the coats themselves without any alteration, without any sales or anything, costs ten thousand eight hundred and forty-one dollars and sixty-five cents.

The Court: That was the replaced coats as distinguished from those where the loss was paid directly?

Mr. Velikanje: That is the actual costs.

The Court: Of the coats that were replaced?

Mr. Velikanje: Yes, and then naturally on those coats it was necessary to have alterations, repairs, changes, and sales, rent, and all the other matters, which I state cost him 51.52 per cent. Now, 51.52 per cent of that figure is five thousand three hundred and eighty-four dollars and eighty-seven cents.

It would be a little higher than that, because there is three hundred and eighty-eight [390] dollars in materials ~~there~~ that I had not figured in computing that, and then his actual cash value of what he paid out, in actual cash settlements was fourteen thousand thirty dollars. We have a discrepancy in that. From the sheets we have here, it shows fourteen thousand thirty dollars.

The Court: Wouldn't that make a sum greater than the sum you claimed for the loss?

Mr. Velikanje: It does, and then off of that we have taken—he collected on these—collected his luxury tax and his sale's tax, and he also on many of the coats, he collected an amount above the replacement. In fact, there were very few of them that it was an actual trade and trade about,—some of them were, but the majority of them, there was a cash difference.

Now, without even figuring any profit on this cash difference, I believe the Court held we were entitled to profit on this cash difference, but even without figuring that, and taking away from that the sales' tax that was collected, it left an amount of one thousand one hundred and fifty-one dollars and one cent that he collected from customers that was taken away from the amount, is a difference—it is the replacement cost plus the cash expenditure, was one thousand six hundred and eighty-nine dollars and fifty-one cents more than [391] the amount we claimed under our proof of loss. In other words, the actual amount of replacement, together with his

cost of doing business is greater than the amount that he had claimed under our proof of loss.

The Court: There is no reason to consider it then. I do not think the Court is warranted. I do not know that it legally could make an award for something other than that indicated by the proof of loss.

Mr. Velikanje: We have not asked for it.

The Court: And if that be a fact, there is no reason to consider the replacement. The thing that the Court is concerned in here, and which was raised on the Court's own motion was that under the terms of this contract of insurance, the insured agreed to pay an actual loss sustained, but did not agree to pay a margin of profit to the merchant, and with so many of these replacements that matter was mentioned frequently in the course of the hearing. On the face of it, it looked as though there were many sales made that otherwise would not have been made, that carried with them a net profit.

Mr. Velikanje: Well, that was my belief, too, when we argued that, but I was surprised to see the result obtained from our computation.

The Court: I will hear from you, Mr. Hutcheson.

Mr. Hutcheson: Your Honor please, I had [392] hoped that we could reach an agreement on these facts, but the matters as counsel just stated, are so utterly—so ridiculous, of course we could not agree to that.

Mr. Kirkevold, the plaintiff, has already testified that he—while he did not go into figures, he tes-

tified that he did make a profit on these replacements, in view of the fact that the cost to him was less than the amount that he would have been paid in cash, if he had made cash settlements with them. There are several objections we have to counsel's statement here. Of course, we are not stipulating the facts, because we do not believe those facts are correct, but counsel has taken into consideration there—I saw the figures before they were completed, although as counsel said I have not seen the complete figures. He has made a deduction—in other words, to arrive at this 51.52 per cent—or first, let me say this. Counsel has not stated the figure, I do not believe, but it was 58.22 per cent of the retail selling price, represents the wholesale cost. In other words, there was a profit—a gross profit there of forty-one and seventy-eight hundredths percent gross profit on the replacement of these coats, which of course is quite a substantial margin. In order to make up that difference there, they have taken into consideration a number of things which [393] we contend are not proper to be considered. One is, they have taken into consideration a very large sum—thousands of dollars, I don't have the exact figure, of rent that they call it rent. It was paid to the Barnes-Woodin Company. In other words, they have a rather high percentage on sales here, whereas, as I shall point out, these were not sales at all. They were replacements. There was no reason for any payment that I can see, or certainly that we should not be charged with the full

amount of rental or payment to Barnes-Woodin, the same as though these were ordinary sales.

The Court: The question there, it seems to me, to be if the plaintiff accounted to Barnes-Woodin on the replacement for his percentage of sales, then it should be counted. If he did not, it should not be. I have got to get this case concluded. I should reopen it right now, and put him on the stand if you want to, and further complete the record.

Mr. Hutcheson: Very well.

The Court: I want to make it brief, because—

MERLE KIRKEVOLD

produced as a witness on behalf of the Defendant, after first being duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hutcheson:

Q. Mr. Kirkevold, I take it that one of the larger items of general overhead expense that you have taken into consideration here, is rent, is that correct? A. Yes.

Q. What was the figure—that of rental, that you took into consideration in arriving at these figures?

A. Well, the store. We are a leased department, and the store get—takes twelve and a half percent of all the sales that comes through. Everything is handled through the office, that comes through the fur department.

(Testimony of Meryl Kirkevold.)

Q. And was that—is that based on a written lease or a written agreement with Barnes-Woodin Company? A. Yes, sir.

Q. Do you have that here with you?

A. A copy of our agreement?

Q. Yes. A. No, I don't.

Q. Did you actually in 1944 and 1945, pay to the Barnes-Woodin Company or its successor, twelve and a half percent of its based on these replacement coats? In other [395] words, we are referring to these cases where you made settlements with customers by furnishing them other coats as distinguished from cash settlement—was that included in the amount paid to the Barnes-Woodin and Company?

A. Well, you mean where there was no cash changed hands?

Q. Yes. A. No.

Q. In other words, where there was no cash sales made of the fur coats, you did not include those coats in the amount you paid to the Barnes-Woodin Company? A. No.

The Court: Suppose you replaced a customer's coat where they claimed a loss of two hundred dollars, and you replaced it with a three hundred dollar coat. Then you had a hundred dollars cash involved?

The Witness: Yes, sir.

The Court: Now, in that instance did you pay the Barnes-Woodin Company twelve and a half per

(Testimony of Meryl Kirkevold.)

cent of the hundred dollars, or of the three hundred dollars?

The Witness: Well, it would be—I would write up the cash we took in.

The Court: Just the cash?

The Witness: The cash we took in.

The Court: I think that is sufficient on [396] that matter. That indicates to me that this rental would have to be taken out of this calculation, up to—because the cash that he got of course can't be figured in. It is not claimed—he did not claim a loss on that, but I wanted and I hoped that that could be done, and it should be done, if counsel both sit down here in the manner which you should, and carry out the idea that the Court has. The Court has the idea that under this policy he should not profit, but the covenant of the policy in reference to covering a loss and making a replacement should be lived up to. I am conscious of the fact that in all probability this case will be appealed. I have no objection to its being appealed, but I do want it to be completed, and I do want the Appellate Court to know the position of the lower court in making a disposition. If the twelve and a half percent is charged against the replacement, of course, it has no place in there, because on that he did not figure twelve and a half percent.

Mr. Velikanje: Your Honor, his statement to me was not that. He said some were and some were not on the sales. I don't know, I would like to interrogate him on that point.

(Testimony of Meryl Kirkevold.)

The Court: I don't think, Mr. Velikanje, with all of these many items—that is the reason upon [397] several occasions the Court suggested that the details be worked out independent of taking the Court's time for them. He knows if he had a general policy there, and I am not going to try this case, retry it, nor go into two or three hundred items here.

Was it your policy that when you replaced a customer's coat with another coat, and there was no cash involved, that that did not go in upon which you paid the twelve and a half percent rental?

The Witness: Where a customer had—say she had two hundred dollars on her receipt. Suppose she was entitled to two hundred dollars. I would take the price of the coat. Of course, I would have to figure a tax, and I would just deduct that two hundred dollars from the sale, and that way, and that is how I arrived at that, the cash figure.

The Court: And the cash you accounted for at twelve and a half percent to your landlord?

The Witness: Uh-huh.

The Court: But, the replacement, did you account for?

The Witness: No.

The Court: And the replacement was on a retail basis, rather than a wholesale basis?

The Witness: I think so. [398]

The Court: That is the reason I hoped you could either agree upon what percentage becomes his overhead, or else the Court will have to adopt some

(Testimony of Meryl Kirkevold.)

figure, not arbitrary, but the witness would have to testify to it, and it would have to be somewhere in reasonable approximation, because we cannot get exactness in a situation such as is presented.

Mr. Velikanje: Your honor, here is one point that bothers me. This policy states the cost of replacing like material and like quality. Now, I am advised by Mr. Kirkevold that this two hundred dollar amount would not replace most of these coats. In other words, let's say a woman put her coat in, as you remember the testimony. With the normal charge they insured it up to two hundred dollars, but let us say that a woman put in a five hundred dollar coat. She did not want anymore insurance on it. She paid merely the two hundred dollars. Now, the testimony in the beginning of these figures has been that the figure of two hundred dollars has been used when that was on the receipt because they were limited to that amount, but to come under this policy it states that it must be a replacement of like material and like quality. Now, many of these women in the taking of a new coat, or a coat back, took of a lesser quality when they were [399] replaced to them, because they could not be replaced with a five hundred dollar coat with a two hundred dollar figure.

The Court: I appreciate that, and the fact you can not take the literal terms of this insurance contract with the loss that was sustained here and attempt to give application to them, because it is humanly impossible to do it. There are so many

(Testimony of Meryl Kirkevold.)

different items and so many different situations that exist, so we must be somewhat practical in arriving at what would be justice between the parties, and in these replacements I shall assume that the insured had the same ability to buy at wholesale that the plaintiff did, and whatever he pays for those things in wholesale, and whatever added expense there was to the transaction, fairly and equitably charged and not for the purpose of getting the letter of the law, but rather the spirit of the situation—that is, he is entitled to——

Mr. Velikanje: Without any consideration of his own labor?

The Court: I would say in this case, yes, without any consideration.

Mr. Velikanje: Because he works in his own fur department——

The Court: Because those things just can't be.

Mr. Velikanje: It seems impossible to work out any figure.

The Court: But, he ought to have some basis upon which he did business, excluding his rent, because—that is, excluding these transactions by his own statement. Now, somewhere there is a figure that fairly represents the exact figure. It might vary every day, and you might cut the day down to hours, but we are not going to do that, but somewhere there is a figure that represents what was his overhead on these replacements, whether that was fifty percent or that was twenty-seven percent.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: Would we not reach the proper figure by taking our costs of replacements and taking from that figure twelve and a half percent of that, and deducting it from the amount that I have?

The Court: If that is the only item that Mr. Hutcheson questions. If there is another, I want to know it, because——

Mr. Hutcheson: I wonder if I could ask just a few questions about a couple of other items.

By Mr. Hutcheson:

Q. With reference to your payments to your employees,—salary—the salary items. You did not pay any [401] commissions, did you, to any employees, based—salesladies, based upon these replacements, did you?

A. I have a salesgirl that usually handled most of the transactions where they took the coat, that she gets so much a week, and I think it is five percent over a certain amount—like over a thousand dollars a month, see?

Q. In arriving at that, whether or not it exceeds the one thousand dollars in computing her commission if any above that, you handled that, didn't you, the same as the rent? That is, you did not include these replacements unless the customer paid cash in addition, isn't that right?

A. Where they bought a new coat, is that what you mean?

Q. I am referring to these replacements.

A. That was figured.

(Testimony of Meryl Kirkevold.)

The Court: No, what Mr. Hutcheson is asking you, as I understand him—let me take a concrete example, because it might bring it out. The customer has two hundred dollars under the contract of insurance that you sought to replace under the lost garments, they had a garment that cost three hundred dollars. The young lady that handled the sale would get a five percent on the three hundred dollars, or the one hundred?

A. That would be worked the same as—— [402]

The Court: The rent?

The Witness: Yes.

Q. The commission would be on the cash excess, or the one hundred dollars? Speak up.

A. That is right.

Q. Now, on this matter of taxes, on the twenty percent federal luxury tax, and the Washington State three percent sale's tax, both of which just apply to sales of fur coats, you have not paid taxes, have you, on these replacements, disregarding the cash? In other words, disregarding any additional tax that might have been paid by the customer, but just the replacements. In other words, the two hundred dollars in the example that the Court gave you have not paid taxes on that two hundred dollars, have you?

A. No.

Q. Pardon? A. No.

Mr. Velikanje: Mr. Hutcheson, might I interpose there that those taxes are all handled by the Barnes-Woodin Company. Whether those taxes

(Testimony of Meryl Kirkevold.)

have been paid I don't know. I briefed that matter at the time this matter came up. My advice to Mr. Kirkevold was to collect this tax and to pay it, and from my briefing the question at that time, he was obligated for it, and [403] in this sales matter, I have a book he kept during that time, and the tax was collected on all of those coats.

The Court: No, that is the point, that he collected.

Mr. Velikanje: He did.

The Court: In the example that was given with three hundred dollars, you——

The Witness: The tax was figured on the whole price of the garment, on the retail price of the garment, if that is what you mean.

Mr. Hutcheson: Well, supposing—take an example where a customer did not pay additional cash, of which there were quite a large number I believe, but assuming she was entitled to a two hundred dollar coat and she obtained the two hundred dollar coat without payment of additional tax, she did not pay you any tax, did she?

The Witness: Where I had to give the customer a coat to satisfy her, I would—I mean to keep the good will of the customer—just an exchange of coats, where there wasn't any money changed hands, is that what you mean?

Mr. Hutcheson: Yes.

Mr. Velikanje: Might I interpose right here and offer this as a record that was kept at the time.

(Testimony of Meryl Kirkevold.)

[404] I think it will show to Your Honor better than what can be done here.

Mr. Hutcheson: I object to your interposing.

The Court: We will have to get along, Mr. Hutcheson. You can direct a few questions that cover this whole situation rather than go into an extended detail, because if this case has to be opened again, and I don't intend to unless there is a very unusual situation. I want to make a disposition of it, and I want to make it as short as I can, but I hoped what the parties would do, would be that you would arrive at what was his cost of doing business, not in the overall business, but insofar as it affected this type of unusual transaction, so that we could measure. Probably the Court will have to go back to its original position, and the defendant, I don't think is so much concerned with that as they are concerned with the major questions here, my original position was, except that I raised upon my own initiative that whatever his losses were, they were measured by sums that were mentioned in the policy, but that to me, it seemed inequitable because there was a margin of profit perhaps made. When we got into this case it was not plead. It was brought up by the Court alone, but I never intended to even remotely suggest that we are going to take each one of these items, and [405] we are going to attempt by calculation to figure exactly what the loss was, because that is humanly impossible to do it, and I would rather, if it were possible this witness to say fairly and squarely

(Testimony of Meryl Kirkevold.)

what his percentage of overhead was. He put it at 51 per cent, but now we find seventeen and a half percent of it should go out, now, if there is an additional twenty percent of taxes included in this 51 or 52 per cent, that should not be in there it ought to be mentioned.

Mr. Velikanje: Taxes are not included in this percentage.

The Court: They are not?

Mr. Velikanje: No.

The Court: Very well, let's proceed.

Q. What is your wholesale cost, Mr. Kirkevold, in your business as compared with your retail selling price. That is, I have discussed that with you and your attorney. Do I understand correctly that your wholesale cost, not including for the moment the general overhead, is fifty-eight and twenty-two hundredths percent of the retail selling price? Is that a fair figure?

Mr. Velikanje: That was the '45 figure, Mr. Hutcheson.

A. If that was the figure that Mr. Frame computed there for me, that is what he figured it out.

Q. To refresh your recollection, do you want to refer to that document?

Mr. Velikanje: Mr. Hutcheson, by the deduction of these other amounts, that figure would be increased, naturally.

Mr. Hutcheson: No.

Q. You can refer to any document you may have here, but I am talking now for the moment

(Testimony of Meryl Kirkevold.)

about your wholesale gross cost as compared with the retail selling price, what you paid to the manufacturer or wholesaler for the coats. That averages, does it not, 58.22 per cent of the retail selling price?

A. If that is the percentage that Mr. Frame figured out from the income tax form.

The Court: Well, look at it and see.

A. (Continuing): That would be the only way.

Q. It is according to my notes?

A. Yes, that is right.

Q. That is right. In other words, the margin of gross profit is forty-one and seventy-eight hundredth percent. That is correct, isn't it?

A. Yes.

Q. And one other question about the taxes. I asked you as to whether the customer paid you. You have not paid the federal or the state on the taxes on these replacement [407] coats, have you?

A. Where no cash took place?

Q. Yes.

A. Changed hands?

Q. Yes. A. No.

Q. And in these cases where there was an additional cash payment, like taking the case that the Court suggested, where the customer was entitled to two hundred dollars but paid one hundred dollars extra and got a coat for three hundred, what taxes if any did you pay on the transaction of that kind?

A. Well. I figured it from the whole retail price

(Testimony of Meryl Kirkevold.)

—I mean, the twenty-three percent, the retail price plus twenty-three percent, less the two hundred.

Q. You say less the two hundred?

A. Uh-huh.

Q. That is, you did not pay any taxes based on the two hundred?

A. No. Well, on the retail price, if the two hundred is involved in the retail price the tax would have been considered—the two hundred would have been considered as part of the full price of the coat—the retail price of the coat.

Q. You say you deducted the two hundred dollars, didn't you? [408]

A. When I collected from the customer, yes.

Q. And when you remitted the tax to the federal or state, you deducted for the two hundred dollars, didn't you?

A. No, that all went through as part of the sale. I only wrote up in the books, I imagine or I—the sale was written up but the customer paid the difference and that is the way it was written up.

Q. Then, the taxes were remitted on the same basis, weren't they, based on the cash the customer paid? A. Yes, I suppose they were.

Mr. Hutcheson: May I see that, just to see what other overhead items there are?

Q. Oh, yes, there is an item here of nineteen hundred and two dollars advertising, is that correct? A. Yes.

Q. In other words, that was the total figure you paid during 1945 for advertising fur coats for sale?

(Testimony of Meryl Kirkevold.)

A. For sale and for work and everything, I mean, the department—it covered the advertising for the fur department.

Mr. Hutcheson: I wonder if we couldn't put a copy of this in evidence. I would like to.

The Court: Mr. Hutcheson, the Court did not dream of having to open this case again, and certainly I have got another assignment at Walla Walla, and I am just questioning whether it is necessary to into [409] those details, for you to make your record. I am coming to the conclusion rather rapidly that I have made a mistake by first suggesting this matter, and it leads into a field so complex and so difficult of exact ascertainment I would be warranted in concluding I could not judicially determine. These items you are now raising to me are quite technical, and I am much inclined to go back to my original position that the loss be measured as proven and then you can take your exceptions and appeal the case.

Items such as advertising in doing business are not proper items to attempt to deduct on these various items, and you just simply tend to establish to this Court how improper, perhaps it was for me to originally suggest that we get down to the actual cost, because it is impractical and impossible of ascertainment.

Mr. Hutcheson: If I can make this suggestion, I think that should be arrived at then at least by taking out of consideration the rent and taxes, because so far as actual replacements are concerned,

(Testimony of Meryl Kirkevold.)

the rent and the taxes should not be taken into consideration out of that.

The Court: There is an item of twelve and a half percent for rent and a five percent item for sales—commissions paid on sales, and I am satisfied those should be deducted from the figures he gives as his cost of doing business.

Mr. Velikanje: Your Honor, on that five percent, I thought Mr. Kirkevold told me it was three percent.

The Witness: Altogether, her salary and her commission, I think it was.

Mr. Velikanje: Well, you paid her salary, no matter what happened?

The Witness: Yes, sir.

Mr. Velikanje: That thirty-five dollars is not figured in the percentage. She has to make so many sales before she gets into the percentage?

The Witness: Yes. Some weeks she does not do it.

Mr. Velikanje: It is possible to ascertain——

The Court: But I shall adopt a figure of five percent there, because the evidence indicates that the salesmen were going into that class where they were getting five per cent.

The Witness: The salary and the percentage. She actually gets three percent, but I was thinking of the overall figure I pay the salesgirl. That would amount——

Mr. Velikanje: In that salary, I am wondering

(Testimony of Meryl Kirkevold.)

[411] whether, using this '45 figure, if we should not go back to the '44.

The Court: What the Court had in mind was that the parties—and in an endeavor to get this litigation finally concluded as far as this Court was concerned, would be able to check the figure in spirit of compromise—get it about what would be fair, twenty-five percent or thirty percent or thirty-five. That would be added to or deducted from, as the case might be, and settle it. The Court would determine it on such a basis, but I never had any thought of holding this matter up. All these details will get us nowhere in the end, except more confused than ever.

Mr. Hutcheson: May I ask this question?

Q. Mr. Kirkevold, would you give us in all fairness a figure to the best of your judgment, that would represent the percentage of actual net profits in connection with the handling of these replacement coats, taking into consideration the fact that you have not—to the replacement or the two hundred dollars in these examples that we have given you in these questions, that you did not pay the rent or sale's commission or taxes on that, taking those facts into consideration, what would you say in all fairness would be your percentage of actual net profit on these replacement coats? [412]

Mr. Velikanje: I object to that.

A. I couldn't say. I am not much on percentages. The only way I can arrive at any percentages is just from figures, but I couldn't say.

(Testimony of Meryl Kirkevold.)

The Court: Well, you were not doing business at a loss.

The Witness: No.

The Court: And before the fire or just before the fire occurred, what was your margin of profit in your business—your net?

The Witness: Well, I really don't know.

The Court: Well, what was it the year following?

Mr. Velikanje: That shows 11.78 per cent is net.

Mr. Hutcheson: In other words, that was your margin of net profit in 1945, taking into consideration all of these expenses. That is correct, isn't it, rent, and everything.

The Witness: Yes.

Mr. Hutcheson: Now, how much more than that would you say your margin of net profit in percentage would be on these replacement coats, as to which, as you have already testified, you did not have that full amount you spent for rent and these other things. [413] How much more than that would the percentage be on those replacements?

The Witness: Well, I couldn't give you a figure because I really don't know—don't know.

Mr. Hutcheson: Well, we offer in evidence this document from which I think the computation can be made of percentage by eliminating the rent item.

The Court: It will be admitted in evidence, but the Court will make the statement it wouldn't be possible for anyone, even in Einstein, I think, in the situation that confronts the Court to deter-

(Testimony of Meryl Kirkevold.)

mine the exact profits to be made on these replacements. Some of his records are gone. Others were not kept at all, and whether it is proper or improper to charge the full twelve and a half per cent that was paid as rentals, as sales or no charge at all, and by reason of another unusual condition, doing business where he compensated his sales people on the salary and the commission basis, it leads to further confusion and added to that, most of these replacements are coupled with an additional item of a sale of an article that exceeded the replacement, all of which means the only way the Court can even approach exactness is to get some general overall figures, and then adopt a figure from that, that is not too much in the field of the arbitrary and seems to about measure the situation, [414] and here, if his net profits were eleven and a half per cent the year before, or approximately that, and following that and allowing three and a half per cent instead of five per cent for commissions and sales, that would be chargeable as against this replacement up to insured value, and plus twelve and a half per cent upon which no rental charge was made, we would have a figure around twenty-seven and a half per cent. That is doubtless high, because you cannot completely divorce all of the activities of this business from all of these others. I think a figure though, measured by twenty-five per cent on replacements is a fair figure, and I think I shall find that—determine that issue that way.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: You mean then, we take our replacement costs and add twenty-five per cent to it, is that what you have in mind?

The Court: Well, I am not sure which, to take an example or a situation where we can make calculations, he charged the customer two hundred dollars for an article that cost him we will say a hundred and fifty dollars, and he had a twenty-five per cent——

Mr. Velikanje: Then, we would have to take our retail price, and take off——

The Court: As your base. That is correct. I think that is correct. [415]

Mr. Velikanje: That figure is seventeen thousand five hundred and sixty-seven dollars and sixty-two cents.

The Court: Of replacements?

Mr. Velikanje: Yes.

The Court: And then, deduct from that twenty-five per cent?

Mr. Velikanje: That is right.

Mr. Hutcheson: Let me ask, Mr. Kirkevold, is the figure Mr. Velikanje just gave correct, the retail selling price, if you had retailed them, of these replacement coats seventeen thousand five hundred and sixty-seven dollars and sixty-two cents, is that figure correct?

Mr. Velikanje: I computed this, Mr. Hutcheson.

The Witness: That is the total of the retail sales column.

(Testimony of Meryl Kirkevold.)

Mr. Velikanje: You gave me these figures?

The Witness: Yes, I gave you those figures.

The Court: That will be the determination of the Court on that item, and the other of course is not one that is in dispute. That is, where the cash was paid, and that should conclude this matter excepting the formal findings, but so far as the sum of money that measures a recovery is concerned.

Do you have anything further, Mr. Hutcheson, in connection with this case? I appreciate that you will perhaps have to modify your findings that have been submitted here.

Mr. Hutcheson: Yes. Well, will Your Honor be in town the rest of the afternoon?

The Court: No, I am not. I have to start for Walla Walla.

Mr. Hutcheson: Well, it is already stipulated the documents can be signed in Tacoma when in final form. To understand Your Honor's ruling, the twenty-five per cent would be deducted from this total, what would be the retail selling price?

The Court: The replacements, not the other.

Mr. Hutcheson: Yes.

The Court: The other is.

Mr. Velikanje: Now, what will we do as to the figure of money received from customers? You see, some money was received from customers, but all of that is taken up in this tax.

The Court: You mean, where a customer bought an article and paid more than the amount?

Mr. Velikanje: That is right.

The Court: I don't think that figures in your loss at all. [417]

Mr. Velikanje: We will take twenty-five per cent of retail.

The Court: If I understand you correctly, this seventeen thousand represents the retail price on the replacements that were made by the insured, but has nothing to do with the amount paid over and above that.

Mr. Velikanje: That figure is the retail price of the coats that were sold then, some people came in and paid additional cash.

Mr. Hutcheson: I think that should be deducted. Can you give us the total of those cash payments?

Mr. Velikanje: Yes, but that will have to be deducted, this cash.

Just a moment. I want Your Honor to see the record which was kept on this, to show this tax matter. That is the book the girl kept off of the sales slips. Mr. Kirkevold does not keep the books. The company keeps the books. He had a girl making these settlements, put a special girl on to make the settlements. We have not figured anything in for that, but that shows that the sales tax was collected on each one. Now, whether he has paid that or not is immaterial, because that tax is necessary to be collected, and he collected it from each of those, and that should be deducted from the amount the customer paid in. [418]

The Court: I don't know. This does not throw very much light, and I can't quite follow you in your argument. Mr. Velikanje, now I don't get

that. I understand the witness to say when he replaced a garment that had a two hundred dollar policy of insurance on it with a two hundred dollar article, he made no sales tax calculation whatever.

Mr. Velikanje: No, I don't believe he stated that.

Mr. Hutcheson: That is what he said.

Mr. Velikanje: He stated——

The Court: But, if he got three hundred dollars out of the transaction, then there was a hundred dollars upon which he collected a sales tax.

Mr. Velikanje: Here is a coat of Squirrel Locke Brown, retail price of that coat was a hundred and ninety-nine dollars and seventeen cents, to which was added thirty-nine dollars and eighty-three cents, marked here as a federal tax, making a total of two hundred and thirty-nine dollars. From that coat they collected fifteen dollars from the customer. In other words, a lot of these customers said they did not want to pay the difference. There was tax put in there of thirty-nine dollars and eighty-three cents.

The Court: If that was his practice throughout, [419] he did not testify to that fact.

Mr. Velikanje: That is what I was trying to get this shown in here. He does not understand about his books. He does not keep them.

Mr. Hutcheson: He is the plaintiff here.

Mr. Velikanje: I know he is the plaintiff. I am trying to bring out the facts in this case.

Mr. Hutcheson: Let me ask, Mr. Velikanje, can

you give us the total in cash paid by the customers as additional payments in connection with the replacements that enters into this seventeen thousand five hundred and sixty-seven dollars and sixty-two cents?

Mr. Velikanje: Four thousand seven hundred and twelve dollars and forty-seven cents.

The Court: What is that item?

Mr. Velikanje: That is what customers paid additional. Now, that is the item that Your Honor said we are entitled to our full profit on. How we are going to figure that in here I don't know,—it is beyond me.

Mr. Hutcheson: I think that should be deducted from the seventeen thousand.

The Court: It isn't in the seventeen thousand at all.

Mr. Velikanje: Yes, it is, because that is [420] the complete price, but of that four thousand seven hundred dollar item, three thousand five hundred and sixty-one dollars and forty-six cents is taxes—was collected as tax, so that there is a difference there of about twelve hundred dollars, and I think the twelve hundred dollars should be deducted.

Mr. Hutcheson: I think the twelve hundred should be deducted from that seventeen thousand figure, and then deduct twenty-five per cent of that and I think that is the answer to the whole thing, under Your Honor's ruling.

Mr. Velikanje: Well, that is right.

The Court: Very well, if the parties will stipulate to that fact the Court will so determine.

Mr. Hutcheson: That is, I think.

The Court: For the record I have indicated two or three times, and I do again. if in this case you want to go on up, and you want to make this an issue in the case, the record in the case shows it is humanly impossible to make a calculation of the many, many items, including the numerous charges that might be proper charges, and the unusual situation that confronts the Court in considering the question as to the whole, when viewed from the light of this particular business, and the manner in which the business was being done. [421]

Mr. Hutcheson: Now, I will stipulate that it seems to me that is the correct method of making the mathematical calculation, in line with Your Honor's ruling. It seems to me we should work it out that way.

The Court: Very well.

Mr. Velikanje: To dispose of it, can we work out these figures right now and stipulate on them so there won't be any further dispute and get our judgment entered? It would take us about three minutes to work this out.

The Court: Yes, but you don't mean I will sign the findings?

Mr. Velikanje: If we can stipulate and definitely decide it, and I will draw up the findings, and we will know where we stand on it.

The Court: Well, you might state your figure to the Court and we can settle it on that.

Mr. Velikanje: The retail price of these coats, replacements was seventeen thousand five hundred

and sixty-seven dollars and sixty-two cents. Deducted from which would be the difference between the tax and the amount collected from customers, of one thousand—wait a minute. One thousand one hundred and fifty-one and one cent, leaving the cost of replacement then at sixteen thousand five hundred and sixty-seven dollars and sixty-two cents.

The Court: Did you say one thousand and fifty-one dollars?

Mr. Velikanje: One thousand and fifty-one dollars and one cent.

The Court: Then, it would not be sixteen thousand, four hundred and sixteen dollars?

Mr. Velikanje: No. Our first figure was seventeen thousand five hundred and sixty-seven sixty-two. That is right, it is sixteen thousand four hundred and sixty-seven.

Mr. Hutcheson: Sixteen thousand four hundred and sixteen, sixty-one.

Mr. Velikanje: That is right.

The Court: And then deduct from that one-fourth, or twenty-five per cent.

Mr. Velikanje: Four thousand one hundred and four dollars and fifteen cents.

The Court: Yes. Leaving that item twelve thousand three hundred and twelve dollars and forty-six cents.

Mr. Velikanje: That is added to which will be the cash settlement of fourteen thousand five hundred and seventy-three dollars and ninety-nine cents.

The Court: Ninety-nine cents?

Mr. Velikanje: Yes. [423]

Mr. Hutcheson: Are you sure it is that much? I thought it was just a little over fourteen thousand.

Mr. Velikanje: The actual amount taken off the checks is fourteen thousand——

The Court: Twenty-seven thousand two hundred and eighty-six dollars and forty-five cents.

Mr. Velikanje: Making a total now in the amount of nineteen thousand eighty-six dollars and forty-five cents.

The Court: How much?

Mr. Velikanje: Making a total of judgment of nineteen thousand eighty-six dollars and forty-five cents. They paid eighty-two hundred.

The Court: That was paid.

Mr. Velikanje: Yes.

The Court: Well, the rest of it is not in dispute. It becomes a matter of calculation.

Mr. Velikanje: Your Honor, in drawing up these findings, do you want each coat listed?

The Court: Well, how did you have that covered before?

Mr. Velikanje: Covered before we had the testified value?

Mr. Hutcheson: The proposed findings list each coat with the appropriate figure, and I think the [424] findings that are signed should be done that way.

Mr. Velikanje: I don't think Your Honor it is necessary to put each coat in where we have reached an arbitrary figure on the judgment.

Mr. Hutcheson: I have already added those cash settlements and I don't get that much. I doubt if that figure is right. I get fourteen thousand one hundred and six dollars and four cents by adding the cash figure stated on the releases.

Mr. Velikanje: There was an additional three hundred and eighty-eight dollars and sixty-five cents that was shown on repair of coats, actually expended on those coats that is not shown. That is another item, Your Honor. They turned over to us all of the material that we could salvage, about three of the coats by replacing the sleeves and by using the pieces that were salvaged.

The Court: I cannot see any necessity, Mr. Hutcheson, of going to a lot of labor of setting forth each coat, and the deductions to be made from it where the Court has not taken an arbitrary figure, but has taken a figure that approximates as nearly as it can be done what the deductions should be to the insured by reason of the replacing, instead of collecting directly, because not one of them would represent an exact figure, [425] and the Court has repeatedly so said and it cannot.

Mr. Hutcheson: That probably could be covered by one or two additional paragraphs of findings, as to these figures we have been discussing today.

The Court: Well, I am willing, too. The plaintiff has secured a judgment of recovery herein. The defendant indicates a desire to appeal the case. If the plaintiff has to meet the contentions that will be raised on an appeal, there isn't any reason why the trial court should ask for findings of fact that

are inconsistent with those that have been originally pronounced. If you want to save your record, you can submit such findings.

I hope I make my position clear to you. There is no reason why I should suggest to you that you should submit a set of findings, expecting me to approve them, they are contrary to the oral pronouncement that I have made.

Mr. Hutcheson: As I read the new rules, I do not believe that we are required to submit findings to be denied by the Court, and so I do not see anything can be gained by doing that.

The Court: No.

Mr. Hutcheson: I was not intending to do that.

The Court: But, so far as you can work out [426] the findings, I would like you to work them out and submit them to me. Just send them over.

Mr. Velikanje: I would love to.

The Court: Very well, then.

Mr. Hutcheson: One other point, Your Honor, we may be in agreement on this. I think when the findings are entered that the Court should sign an order fixing the amount of costs and superseas bonds on appeal, how much that should be.

Mr. Velikanje: I told Mr. Hutcheson something around twenty thousand dollars would be sufficient.

The Court: You may make such an order. I am not going to assume that you are going to appeal.

Apparently the amount should be fixed by order of the Court.

Mr. Velikanje: While we are here I will offer

this book, showing the sales records made at the time of the settlement. This was a book kept by the girl working for him in his employ.

Mr. Hutcheson: Objected to as not properly identified.

The Court: It will be admitted then.

(Whereupon, notebook referred to was then received in evidence and marked Plaintiff's Exhibit A-1.) [427]

The Court: That is all in this case, and you submit your findings later.

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,

Official Court Reporter.

[Endorsed]: Filed June 22, 1946. [428]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF EXHIBITS

The court being of the opinion, pursuant to rule 75(i) of the Federal Rules of Civil Procedure, that the original exhibits herein should be inspected by the appellate court;

Now, Therefore, It Is Hereby Ordered that the Clerk of this court is hereby authorized and directed to transmit to the clerk of the Circuit Court of Appeals all of the original exhibits introduced in the above-entitled cause, in lieu of copies thereof; the same to be transmitted at the same time as the remainder of the transcript of record is transmitted to said court.

Done in open court this 21st day of June, 1946.

CHARLES H. LEAVY,

U. S. District Judge.

Presented by:

CHENEY, HUTCHESON & GAVIN,

ELWOOD HUTCHESON,

Attorneys for Defendant.

O. K.

VELIKANJE & VELIKANJE,

Attorneys for Plaintiff.

[Endorsed]: Filed June 22, 1946. [429]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, The Home Insurance Company of New York, a corporation, and respectfully moves the court that the oral decision of the court herein be vacated and that judgment be entered herein in favor of the plaintiff and against the defendant for not to exceed the sum of \$1800.00.

Without waiving the foregoing motion, the said defendant hereby respectfully moves the court that the oral decision herein be vacated and that a new trial be granted herein for the following reasons and upon the following grounds materially prejudicing the substantial right of this defendant:

1. Irregularity in the proceedings of the court and the plaintiff; and orders of the court and abuses of discretion by which the defendant was prevented from having a fair trial.

2. Accident and surprise which ordinary prudence could not have guarded against.

3. Newly discovered evidence material for the defendant which it could not with reasonable diligence have discovered and produced at the [430] trial.

4. Excessive damages appearing to have been given under the influence of passion and prejudice.

5. Insufficiency of the evidence to justify the decision.

6. Errors in law occurring at the trial.

That the evidence herein was insufficient to justify the decision, in the following particulars:

(a.) There was no evidence which would justify a recovery by the plaintiff herein in excess of the sum of \$1800.00.

(b.) The evidence was wholly insufficient to establish that there was any storage room, within the meaning of the insurance policy contract, on the mezzanine floor of the Barnes-Woodin Department Store, where the fire damage involved herein occurred.

(c.) That the evidence herein was wholly insufficient to establish any liability of the defendant in excess of the sum of \$10,000, by reason of the limitation in the insurance policy limiting said liability to the sum of \$10,000 as to any damages occurring outside of storage rooms, vaults, and safes.

(d.) The evidence was insufficient to establish any liability of the defendant as to any fur garment in excess of the agreed valuation thereof stated on the receipt issued by the plaintiff to the customer pursuant to the provisions of the insurance policy involved herein.

(e.) The evidence was insufficient to justify any recovery by the plaintiff against the defendant herein for fur garments as to which no valuation was stated by the plaintiff on the receipts issued by him to his customers, as required by the insurance policy involved herein.

(f.) The evidence was insufficient to justify any recovery by the plaintiff at all as to fur garments damaged or destroyed in [431] said fire which were replaced by the plaintiff, as distinguished from the plaintiff making cash settlements with said customers, by reason of the fact that the evidence fails to show the actual cost to the plaintiff of replacing the said fur coats; and in any event plaintiff would not be entitled to recover therefor in excess of his actual costs of replacement thereof.

(g.) That the evidence was insufficient to authorize or support a recovery of judgment by the plaintiff against the defendant herein, as to all or any of the fur coats and garments involved herein; and the evidence fails to show with sufficient certainty and definiteness the amount of recoverable loss as to each of said coats.

That the court committed the following errors in law at the trial of this action:

(a.) In admitting in evidence Exhibit 6, the same being a small notebook containing a purported list of plaintiff's insurance policies alleged to have been delivered by Mr. Orkney to the plaintiff; the same being wholly immaterial, irrelevant, incompetent, not the best evidence, and attempts to alter the terms of the insurance policy by parol evidence and without proof of any authority of Mr. Orkney, as a representative of the defendant to alter the defendant's liability under its insurance policy.

(b.) In admitting in evidence plaintiff's Exhibit 4, the same being a purported assignment from an-

other insurance company relative to the McGilvery coat, as the same is immaterial, irrelevant, incompetent, and not sufficiently proven or identified.

(c.) In admitting in evidence plaintiff's advertising circular and newspaper advertisements, as the same are immaterial, irrelevant, incompetent, self-serving, and not binding on the defendant. [432]

(d.) In deciding that the west end of the workroom on the mezzanine floor of the Barnes-Woodin Department Store constituted a storage room.

(e.) In deciding that 75 per cent of the damage to fur coats in the fire involved herein comes within the \$100,000 limit of the insurance policy as to damage to fur coats in storage rooms, vaults, and safes, and that the same does not come within the \$10,000 policy limit as to loss outside of storage rooms, vaults, and safes.

(f.) In holding and deciding that plaintiff is entitled to recover herein any sum in excess of \$1800.00.

(g.) In holding that the maximum limit of defendant's liability by reason of said fire exceeds the sum of \$10,000.

(h.) In holding and deciding that plaintiff can recover herein for more than the cost to him of fur coats replaced by him in lieu of customers' fur coats destroyed or damaged in said fire, as distinguished from cash settlements with customers.

(i.) In holding and deciding that plaintiff can recover herein as to any fur garment an amount in

excess of the valuation stated on the customers' receipt therefor.

(j.) In holding and deciding that plaintiff can recover herein as to any fur garment as to which no valuation was stated upon the receipt issued by plaintiff to the customer as required by said insurance policy.

(k.) In failing and refusing to enter judgment dismissing this action or limiting the further recovery of plaintiff herein to the sum of \$1800.00, in addition to the sum of \$8200.00 heretofore paid by defendant to plaintiff.

The defendant hereby consents that additional testimony may be introduced, and in the alternative makes application to the court [433] for permission that additional testimony be introduced by the plaintiff and defendant herein, showing the actual cost to plaintiff, at wholesale, of the fur coats used as replacements to customers for any of the destroyed or damaged coats involved herein.

This motion is based upon the records and files herein, and upon the minutes of the court, and the proceedings had at the trial of this cause, and upon the affidavit of Elwood Hutcheson hereto attached and made a part hereof.

CHENEY, HUTCHESON &
GAVIN,
ELWOOD HUTCHESON

Attorneys for Defendant.

United States of America,
State of Washington,
County of Yakima—ss.

AFFIDAVIT

Elwood Hutcheson, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant herein, and in charge of this litigation for said defendant.

That at the time of the trial of this action the defendant herein, and affiant, believed and were of the opinion, and now believe and are of the opinion that the burden of proof rested upon the plaintiff herein in order to prove the amount of recovery, if any, to which he was entitled herein, if he was entitled to recover at all, to prove the cost to the plaintiff, that is the wholesale selling price of the fur coats, used by the plaintiff to replace garments lost or damaged in the fire involved herein, as distinguished from cash settlements with customers. That consequently defendant did not introduce testimony on that point. That in truth and in fact more than 40 per cent of the retail selling price of fur coats of a similar nature [434] represents the profits of the retailer, such as the plaintiff herein, and that the wholesale cost to plaintiff for said fur coats for replacement purposes was at least 40 per cent less than the retail selling values thereof. That the amount of recovery of the plaintiff, if any, for fur coats which were replaced to customers,

should therefore be at least 40 per cent less than the retail selling prices thereof as testified to by plaintiff.

That in view of the ruling of the court at the close of the trial that the plaintiff was not required to introduce testimony with reference thereto, the defendant should now be permitted to introduce additional testimony upon that point as hereinabove stated. That defendant hereby consents to the introduction by the plaintiff and defendant of additional testimony upon that subject; and in the alternative, defendant makes application for permission to introduce such additional testimony.

ELWOOD HUTCHESON.

Subscribed and sworn to before me this 18th day of March, 1946.

[Seal]

GORDON HANSON,

Notary Public for Washington, residing at Yakima therein.

Service accepted and copy received this 19th day of March, 1946.

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

Attorneys for Plaintiff.

[Endorsed]: Filed March 19, 1946. [435]

Court Room at Tacoma, Washington, April 9, 1946

Present: Hon. Charles H. Leavy, District Judge; Gladys Chitty, Deputy Clerk; Carroll Graham and Hallie Denise, Bailiffs; Russell Anderson, Court Reporter.

[Title of Cause]

Now, on this 9th day of April, 1946, this cause comes on before the court for hearing on motion for new trial. E. F. Velikanje represents the plaintiff and Elwood Hutcheson represents the defendant. Case is called. Both sides ready. Argument on motion by Mr. Hutcheson on behalf of the defendant.

At 11:55 court recessed until 2 p.m.

At 2:00 p.m. court is again in session. All parties present. Argument is commenced by Mr. Velikanje on behalf of the defendant.

The Court now denies the motion for a new trial.

The Court now requests that the parties attempt to agree by stipulation on the net loss plaintiff sustained as to garments replaced, otherwise the court will consider re-opening the case to take further evidence on that issue and make a finding.

Both counsel now stipulate that, based on the contingency that parties agree on calculations, Findings of Fact may be signed either in Tacoma or Yakima. [437]

[Title of District Court and Cause]

PROPOSED FINDINGS OF FACT AND CON-
CLUSIONS OF LAW

The above-entitled matter coming on regularly for trial in open court before the Hon. Charles H. Leavy, District Judge, on the 7th day of March, 1946, at Yakima, Washington, plaintiff appearing in person and by his attorneys of record, Velikanje & Velikanje, by E. F. Velikanje, of counsel, and defendant appearing by its attorneys of record, Cheney, Hutcheson & Gavin, by Elwood Hutcheson of counsel, and the court receiving evidence, oral and written, and there being no appearance by or on behalf of the third-party defendant Dorothy Riggs, and the court being fully advised in the premises, does not make the following

FINDINGS OF FACT:

1.

That the plaintiff is engaged in business as the Barnes-Woodin Fur Department in the City of Yakima, Washington, and has filed with the Clerk of Yakima County a Business Certificate of Assumed Name.

2.

That the defendant Home Insurance Company of New York is a corporation doing business in the State of Washington and duly [439] licensed to do such business in the State of Washington.

3.

That on the 17th day of August, 1942, the defendant, Home Insurance Company of New York entered into a written contract with said plaintiff, whereby said defendant agreed to insure the plaintiff against loss on furs or garments trimmed with fur, being the property of the customers, accepted by the insured for storage, alteration, repairing, cleaning or remodeling, while said furs or garments trimmed with fur were in the custody or in the control of the plaintiff. That said agreement was incorporated in a written contract termed "Furriers-Customers Basic Policy," being No. FC 1824. Said policy further provided, upon an attached endorsement, this policy was extended to cover, during transportation or otherwise, such furs or garments trimmed with fur, the property of customers, for which the assured has issued a certificate of insurance on forms approved by the company; and further provided that an additional premium was made payable for said additional coverage of the issuance of such certificate.

4.

That under the terms and conditions of said policy above-referred to, the defendant company obligated itself to pay loss not to exceed the sum of \$100,000.00 on customers' articles lost or destroyed in storage rooms, vaults and safes, and not to exceed \$10,000.00 on customers' goods outside of storage rooms, vaults and safes.

5.

That at all times hereinafter mentioned, from

and after the 17th day of August, 1942, up to and after the 9th day of May, 1944, said policy was in full force and effect, all premiums having been paid, and plaintiff having complied with all the terms and conditions of said policy. [440]

6.

That on or about the 9th day of May, 1944, a loss was sustained at plaintiff's place of business, at 301 East Yakima Avenue, in the City of Yakima, County of Yakima, State of Washington, which was a loss by fire, originating from an unknown cause and not the result of any negligence on the part of the plaintiff, his agent or employees. That as a result of said fire 152 furs, fur coats, and articles trimmed with fur, belonging to customers, which were in the control and custody of the insured for alteration, repairing, cleaning, remodeling, preparation for storage, return to customers and in storage, were destroyed, of the value of \$27,565.00; said value being exclusive of the articles of Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, Mabel G. Smith and Erma Turnell. The last named six parties, all having been made third-party defendants, have failed to appear or prosecute their claim in said action and are in default. That plaintiff consummated settlement with all of the customers suffering damage from said loss, except the above-named parties who were made the third-party defendants.

7.

That on the 21st day of August, 1944, being within

the extended time of filing proof of claims, the plaintiff caused to be filed with the Home Insurance Company, and its agent Fire Company Adjustment Bureau, Inc., detailed proof of loss, showing loss in the sum of \$29,785.00. That said defendant has in its possession said proofs of loss and the originals thereof.

8.

That thirteen of the customers who suffered loss in said fire had their furs and garments trimmed with furs covered by certificate endorsements, being special certificate policies covering the amount [441] beyond that as listed under the assured's legal liability. That said customers had paid an additional premium for said additional coverage, and had filed with said company due proof of loss. That under a letter, dated October 4, 1944, the law firm of Cheney & Hutcheson, appearing for and on behalf of the defendant herein, returned to said customers and policy holders their proof of loss with a notation that settlement would be completed with them.

9.

That seventy-five percent of the furs, fur coats, or garments trimmed with furs, belonging to customers and destroyed in said fire, were situated in a storage room of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington. Twenty-five percent of said articles were situated outside of a storage room, vault or safe of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington. That seventy-five percent of

said loss of customers' costs is therefore charged against the \$100,000.00 provision of the insurance policy covering articles in storage rooms, vaults and safes; and twenty-five percent of said loss is charged against the \$10,000.00 coverage of articles outside of storage rooms, vaults and safes.

10.

That the plaintiff has secured settlement with 145 persons suffering loss in said fire and this action was instituted upon the assigned claims of said parties, for which plaintiff is entitled to judgment against the defendant, the Home Insurance Company of New York, for a loss of \$27,565.00, less \$8,200.00 which defendant has previously paid on account, leaving a balance now due and owing in the sum of \$19,365.00.

That said loss is made up from the following named parties who suffered said loss and assigned their claim, together with the amount, being an amount either of the necessary payment for cash [442] of the value of the article destroyed and which was replaced or for which credit was given upon the purchase of a new article:

Value	Owner
\$ 75.00	Albrecht, Mrs. Ernest.
150.00	Andrews, Mabel
180.00	Arteel, Mrs. W. J.
100.00	Babcock, Mrs. Ralph
75.00	Bair, Mrs. Howard
280.00	Balke, Mrs. Emma
200.00	Basey, Mrs. Grace

Value	Owner
50.00	Bauer, Hattie
100.00	Beauchene, Mrs. A. J.
450.00	Beerman, Mrs. W. H.
350.00	Belaire, Mrs. Victor
200.00	Bell, Doris Benoit
400.00	Bitter, Mrs. Gregory
200.00	Bloxom, Mrs. Merritt
150.00	Bobst, Mrs. Mae
150.00	Bodine, Florence
200.00	Brimmer, H. V.
185.00	Brown, Mrs. Fred F.
125.00	Burke, Barbara G.
200.00	Busby, Mrs. Thomas
200.00	Buttke, W. H.
150.00	Campbell, Helen
150.00	Carman, Mrs. Rex
150.00	Cash, Mrs. Harold
150.00	Chadwick, R. E.
100.00	Chance, May
150.00	Clarke, Glen L.
150.00	Clements, James
250.00	Conkey, A. L.
100.00	Cox, Alice
200.00	Cronholm, Mrs. A. L.
200.00	Dasdice, J. A.
500.00	Dawson, Mrs. F. C.
100.00	Dawson, Mrs. F. C.
150.00	Densmore, Mrs. W.
150.00	Dewar, Gladys N.
200.00	Dormaier, C. C.
200.00	Draper, Wm. C.

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Value	Owner
50.00	Edwards, Mrs. Floyd C.
200.00	Erickson, O. H.
100.00	Eschback, Mrs. Ed.
200.00	Etl, Lillian
200.00	Eyman, Mrs. Chas.
200.00	Fetherstone, Mrs. J. E.
25.00	Fiebelkom, Hazel
250.00	Flater, Mrs. Mabel
200.00	Fleming, Mrs. Del.
100.00	Fleming, Mrs. Del
300.00	Foran, Ruth
225.00	Fortier, Mrs. Geo.
150.00	Fox, Mrs. H. R.
200.00	Fraser, Mrs. Ronald
150.00	Fuqua, A. E.
150.00	Cannon, Gertrude
150.00	Goetz, W.
150.00	Griffeth
375.00	Hagne, Harold J.
100.00	Hall, Angeline
175.00	Hamilton, J. C.
200.00	Hanratty
175.00	Harnden, W. G.
150.00	Hartman, Dean
200.00	Hayes, C. P.
150.00	Herrette,
200.00	Hillmer, Beatrice
200.00	Holtzinger, C. R.
75.00	Hornsberger, A.
180.00	Jarvis, Helen

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Value	Owner	
150.00	Johnson, Fred E.	
140.00	Jahr, Edna C.	
350.00	Jones, M. W.	
100.00	Junker, Elizabeth	
200.00	Kinney, C. H.	
225.00	Kious, Mrs. Vernon	
200.00	Knight, Ida	
200.00	Krause, Mary Alice	
250.00	Leach, E. E.	
200.00	Lisle, Ivan B.	
500.00	Logozzo, Elsie	
225.00	Lowenthal, Carl	
150.00	Lyon, W. F.	
125.00	Mace, Clark	
100.00	Magee, Patricia	
200.00	Martinez, M. J.	
350.00	McCorkindale, Elaine	
200.00	McGilvery, G. F.	
200.00	Meek, Eleanor	
200.00	Merceke, J. W.	
200.00	Messer, Lucille H.	[445]
140.00	Metyger, Bee	
300.00	Miller, H. R.	
75.00	Mixon, Betty	
100.00	Mixon, Louise	
150.00	Moore, J. D.	
325.00	Morrill, Florence	
150.00	Marse, Mrs. Opal	
100.00	Munsil, L. W.	
150.00	Nelson, Mrs. Elmer R.	
200.00	Odell, Harry	

Value	Owner
75.00	Orth, J. E.
400.00	Palmer, F. C.
100.00	Palmer, F. C.
135.00	Patnode, Mrs. Mose
200.00	Peterson, Laura
100.00	Pollard, H. E.
150.00	Poulter, Merle
100.00	Pulos, Ada
200.00	Reich, Mrs. Wm.
200.00	Reischl, Irene
200.00	Richards, Gordon
200.00	Ritchie, Clarence
75.00	Robinson, K. G.
200.00	Ross, Nan
200.00	Ryker, Rodney
200.00	Schmidt, G. A.
200.00	Schmidt, Rudy
200.00	Schoonover, Jack
75.00	Shaw, Verda Gayle
200.00	Shirran, W. C.
250.00	Southier, Frank
200.00	Spinner, H. R.
800.00	Stanley, Dorthea
	Stanley, Dorthea
150.00	Stanley, Gladys
100.00	Stoltenow, B. W.
350.00	Stuart, Agnes M.
250.00	Stumpf, John H.
100.00	Taliaferro, Thehna
200.00	Thacker, Cecil
100.00	Thomas, David G.

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Value	Owner
200.00	Thomas, Elmer
200.00	Thompson, J. C.
75.00	Tilton, Mrs. Rex
200.00	Timpke, Glen D.
350.00	Verd, Mrs. Chas.
150.00	Vivian, James
225.00	Wait, Carlyle
200.00	Walsh, C. J.
250.00	Warner, A. K.
200.00	Wiehl, Wright
150.00	Williams, D. A.
200.00	Wilson, Ed.
100.00	Wright, Delbert
350.00	York, Paul F.
400.00	Bryon, Irene

.\$27565.00

11.

That the third-party defendant, Dorothy Riggs, who, having appeared in said action but failed to prosecute her claim and is, therefore, in default.

The Court having heretofore made and entered its Findings of Fact does now making the following

CONCLUSIONS OF LAW:

1.

That the plaintiff, Meryl W. Kirkevold, doing business as Barnes-Woodin Fur Department, be, and he is, hereby entitled to judgment against the defendant, Home Insurance Company of New York, a corporation, in the sum of Nineteen Thousand

Three Hundred and Sixty-five Dollars (\$19,365.00), together with his costs and disbursements herein incurred.

2.

That the Third-party defendant, Dorothy Riggs, be held in default and be granted nothing for her answer.

3.

That all of the third-party defendants, or anyone claiming under or through them, are permanently barred and enjoined from asserting any claim of any kind or nature whatsoever against the plaintiff or the defendant herein for any loss suffered from the loss of furs, fur coats or articles trimmed with furs in that certain fire in the Barnes-Woodin Fur Department on May 9, 1944.

Done in open Court this .. day of, 1946.

.....

District Judge

Presented By:

VELIKANJE & VELIKANJE

/s/ E. F. VELIKANJE,

Attorneys for Plaintiff [448]

[Title of District Court and Cause]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS

Without waiving other objections to the substance and form of plaintiff's proposed findings of fact,

defendant submits its principal objections to the form thereof as follows:

1. Paragraphs 3 and 4 of the findings are incomplete in that they refer to only a very small part of the insurance contract. Our answer quoted the material portions of the policy having a direct bearing upon the issues herein as to various maximum limits of liability. These proposed findings do not fully cover the same. For example, the findings omit the policy requirements that liability cannot exceed the valuations stated on receipts and cannot exceed the cost replacement of the fur coats and that certificates issued were expressly subject to the conditions of the master policy.

2. The last clause of paragraphs 5 is erroneous. Plaintiff has not complied with all the terms and conditions of the policy. It is undisputed that plaintiff wrongfully issued certificates for larger amounts than the valuations shown on receipts and at different times, and that secondly, plaintiff omitted valuations on numerous receipts issued, all of which is contrary to the terms and conditions of the policy. [449]

3. Referring to finding 6, we do not believe there was any proof that the fire was not the result of negligence of plaintiff's employees. On the contrary, the record was silent as to what was the cause of the fire.

4. The figure \$27,415.00 referred to in proposed findings 6 and 10, is incorrect. The same should be \$25.00 less, or \$27,390.00; in view of the fact that

at the Tacoma argument plaintiff's attorney conceded that the liability on the Belaire coat could not exceed \$325.00 rather than \$350.00.

5. The last sentence in paragraph 7 is erroneous. The proof of loss was introduced as an exhibit and is not in our possession. .

6. In paragraph 10 the amount paid in cash by customers is stated as \$1151.01. This is incorrect. This clause should read: "Of which amount customers paid in cash \$4712.47, out of which 20% federal luxury tax is payable, in the total sum of \$3561.46, or a net amount of \$1151.01," etc. Proposed finding 10 is erroneous in stating the amount paid in cash by customers; and the same should be clarified as hereinabove stated.

7. Paragraph 10 states that the total paid on cash settlements was \$14,973.99. This is incorrect. The total of the figures of cash settlement shown by the written releases, which are exhibits herein, is \$14,106.04. This correction by way of reduction in the total amount of cash settlement results in a reduction of \$867.95 (\$14,973.99 less \$14,106.04). Deducting this amount changes the \$27,286.45 figure to \$26,418.50, and the final figure, or amount of recovery herein, \$19,086.45 should be changed in finding 10 and the conclusions of law and judgment by deducting \$867.95 at least, or a final figure not exceeding \$18,218.50.

8. Also, we submit that the findings of fact should contain a list of the names of the customers with whom settlements were made [450] and the cash

amount to which each was entitled under the evidence, aside from the matter of coat replacements. It is true that the final amount of recovery is somewhat less by reason of deducting the net profits of plaintiff on the coat replacements. There is, however, no inconsistency in such findings. It is merely a case where the defendant is entitled to the benefit of five or six different provisions of the policy specifying maximum limits of liability, either total over all liability, or liability as to each specific garment. This list should be followed by a finding such as paragraph 10, with the figures therein corrected as hereinabove stated. The reason for urging this objection is that if this is done the findings would be much more helpful to the appellate court in determining certain of the other issues herein as to liability upon specific fur coats, where, for example, the amount claimed exceeds the figure stated on the receipt.

Respectfully submitted,

CHENEY, HUTCHESON &
GAVIN,

Attorneys for Defendant

Service accepted and copy received this 9th day of May, 1946.

VELIKANJE & VELIKANJE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1946. [451]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWER TO THE DEFEND-
ANT'S OBJECTIONS TO PLAINTIFF'S
PROPOSED FINDINGS

Comes now the plaintiff in the above-entitled action and in answer to Defendant's objections to plaintiff's proposed findings states as follows, to-wit:

1.

In answer to objection No. 1, it is plaintiff's belief that sufficient is shown in these findings to substantiate the decree. Naturally, the whole policy cannot be quoted and the policy is an exhibit in the case and naturally part of said case and can be referred to as such.

2.

It is plaintiff's belief that all the terms and conditions of the policy have been complied with and do not believe that the court has ruled to the contrary in any instance.

3.

If plaintiff's memory is correct as to evidence, it was testified that the cause of the fire was unknown, but was believed to be defective wiring. There was no evidence that the fire was the result of any negligence on plaintiff's behalf. [452]

4.

Plaintiff, while in Tacoma, stipulated to a reduction of the Logozzo coat of \$150.00, but did not agree to any reduction of \$25.00 on the Belaire

coat. This matter, however, is immaterial as the Court has not based its judgment upon those figures.

5.

Paragraph 5 might be well taken due to the fact that Proof of Loss, introduced as an exhibit, might not now be in defendant's possession; however, it was in defendant's possession at time of trial and we do not believe that it is material or erroneous in said findings.

6.

We do not believe that it is material how the \$1,151.01 is shown, as this was the only amount that was beneficial to appellant; the balance of tax was not in any way an asset or beneficial to him.

7.

Counsel is clearly in error as to figures as stated in paragraph 7, for the figure of cash settlement as testified to by Mr. Kirkevold at the hearing in Yakima on May 2nd, was \$14,973.99. This variance from the amount shown on the releases is due partially to the fact that some of the parties originally agreed to take coats in replacement and signed releases at that time; these parties later changed their minds and took a cash settlement and the releases were not changed. This was due to the fact that it was not contemplated that this case would be submitted on any question of replacement, but would be submitted upon the value of the coats as was submitted at trial and as was agreed upon at the pre-trial hearing. Therefore, this amount should not be reduced by \$867.95.

8.

The Court ruled that it was not necessary, due to the change of manner of reaching a judgment, to list each individual coat and [453] calculate an amount for each coat, this being an impossibility due to the inability to reach any definite percentage or figure on any specific coat of the actual value of replacement. By this method defendant is given an advantage of a lesser amount of judgment than was originally done by placing each coat at a valuation at the time of fire and defendant should not be allowed to take the benefit of the replacement cost on one coat and then another valuation on another coat where this is one loss and is handled as one loss or one actual replacement with reimbursement to plaintiff.

Therefore, Plaintiff respectfully submits that the findings as submitted are correct and any variance is not material or reversible error and should be signed as submitted.

Respectfully submitted,

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE.

(Acknowledgment of Service.)

[Endorsed]: Filed May 14, 1946. [454]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This cause having duly and regularly come on for hearing on the 9th day of April, 1946, upon the

defendant's motion for new trial, and the court having heard the arguments of counsel, and being duly advised in the premises; and the court having stated that prior to the entry of findings and judgment herein the court would give further consideration to the contention of the defendant that liability herein under the policy cannot exceed the cost to the plaintiff of replacing fur coats to customers and to the amount of the net profits of the plaintiff relative to such fur coat replacements;

Now, Therefore, It Is Hereby Ordered that in all other respects the motion of the defendant for entry of judgment in favor of the plaintiff herein in the sum of \$1800.00, and the motion of the defendant for a new trial herein, and each of them, are hereby denied.

Defendant duly excepts and its exceptions are allowed.

Done in open court this 14th day of May, 1946.

CHARLES H. LEAVY,
U. S. District Judge.

Presented by:

CHENEY, HUTCHESON &
GAVIN,

By ELWOOD HUTCHESON,
Attorneys for Defendant.

O. K. as to form.

VELIKANJE & VELIKANJE,
/s/ E. F. VELIKANJE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1946. [438]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled matter coming on regularly for trial in open court before the Hon. Charles H. Leavy, District Judge, on the 7th day of March, 1946, at Yakima, Washington, plaintiff appearing in person and by his attorneys of record, Velikanje & Velikanje, by E. F. Velikanje, of counsel, and defendant appearing by its attorneys of record, Cheney, Hutcheson & Gavin, by Elwood Hutcheson of counsel, and the court receiving evidence, oral and written, and there being no appearance by or on behalf of the third-party defendant, Dorothy Riggs, and the court being fully advised in the premises, does now make the following

FINDINGS OF FACT

1.

That the plaintiff is engaged in business as the Barnes-Woodin Fur Department in the City of Yakima, Washington, and has filed with the Clerk of Yakima County a Business Certificate of Assumed Name.

2.

That the defendant, Home Insurance Company of New York, is [455] a corporation doing business in the State of Washington and duly licensed to do business in the State of Washington.

3.

That on the 17th day of August, 1942, the de-

fendant, Home Insurance Company of New York, entered into a written contract with said plaintiff, whereby said defendant agreed to insure the plaintiff against loss on furs or garments trimmed with fur, being the property of the customers accepted by the insured for storage, alteration, repairing, cleaning or remodeling, while said furs or garments trimmed with fur were in the custody or in the control of the plaintiff. That said agreement was incorporated in a written contract termed "Furriers-Customers Basic Policy," being No. FC 1824. Said policy further provided, upon an attached endorsement, this policy was extended to cover, during transportation or otherwise, such furs or garments trimmed with fur, the property of customers, for which the assured has issued a certificate of insurance on forms approved by the company; and further provided that an additional premium was made payable for said additional coverage of the issuance of such certificate.

4.

That under the terms and conditions of said policy above referred to, the defendant company, obligated itself to pay loss not to exceed the sum of \$100,000.00 on customers' articles lost or destroyed in storage rooms, vaults and safes, and not to exceed \$10,000.00 on customers' goods outside of storage rooms, vaults and safes.

5.

That at all times hereinafter mentioned, from and after the 17th day of August, 1942, up to and

after the 9th day of May, 1944, said policy was in full force and effect, all premiums having been paid, and plaintiff having complied with all the terms and conditions of said policy. [456]

6.

That on or about the 9th day of May, 1944, a loss was sustained at plaintiff's place of business, at 301 East Yakima Avenue, in the City of Yakima, County of Yakima, State of Washington, which was a loss by fire, originating from an unknown cause and not the result of any negligence on the part of the plaintiff, his agent or employees. That as a result of said fire 152 furs, fur coats, and articles trimmed with fur, belonging to customers, which were in the control and custody of the insured for alteration, repairing, cleaning, remodeling, preparation for storage, return to customers and in storage, were destroyed, of the value of \$27,415.00; said value being exclusive of the articles of Clara Harbin, Mrs. William McClure, Mabel Miller Ray, Dorothy Riggs, Mabel G. Smith and Erma Turnell. The last named six parties, all having been made third-party defendants, have failed to appear or prosecute their claim in said action and are in default. That plaintiff consummated settlement with all of the customers suffering damage from said loss, except the above-named parties who were made the third-party defendants.

That on the 21st day of August, 1944, being with-

in the extended time of filing proof of claims, the plaintiff caused to be filed with the Home Insurance Company, and its agent, Fire Company Adjustment Bureau, Inc., detailed proof of loss, showing loss in the sum of \$29,785.00. That said defendant has in its possession said proofs of loss and the originals thereof.

8.

That thirteen of the customers who suffered loss in said fire had their furs and garments trimmed with furs covered by certificate endorsements, being special certificate policies covering the amount beyond that as listed under the assured's legal liability. That [457] said customers had paid an additional premium for said additional coverage, and had filed with said company due proof of loss. That under a letter, dated October 4, 1944, the law firm of Cheney & Hutcheson, appearing for and on behalf of the defendant herein, returned to said customers and policy holders their proof of loss with a notation that settlement would be completed with them.

9.

That seventy-five per cent of the furs, fur coats, or garments trimmed with furs, belonging to customers and destroyed in said fire, were situated in a storage room of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington. Twenty-five per cent of said articles were situated outside of a storage room, vault or safe of plaintiff at his place of business at 301 East Yakima Avenue, Yakima, Washington. That seventy-five per cent

of said loss of customers' coats is therefore charged against the \$100,000.00 provision of the insurance policy covering articles in storage rooms, vaults and safes; and twenty-five per cent of said loss is charged against the \$10,000.00 coverage of articles outside of storage rooms, vaults and safes.

10.

That plaintiff has secured settlement with 145 persons suffering loss in said fire and this action was instituted upon the assigned claims of said parties. That the value of said coats destroyed at the time of the fire, or a maximum value of that listed upon receipts, or the amount of cash necessary to settlement, combined, was \$27,415.00. Plaintiff, however, being engaged in the fur business was able to make settlement with some of the persons suffering loss by replacing or reselling new coats. That the retail value of said coats sold or replaced was \$17,567.62, of which amount customers paid in cash \$1,151.01, leaving a net retail or replacement of \$16,416.61. That plaintiff's approximate net profit on items [458] sold is 25%, making a cost to plaintiff of \$12,312.46; that in addition thereto, on cash settlements plaintiff paid the sum of \$14,973.99; making a total cost of settlement to plaintiff of \$27,286.45, less the sum of \$8,200.00, which defendant has previously paid on account, leaving a balance now due and owing in the sum of \$19,086.45.

11.

That the third-party defendant, Dorothy Riggs,

who, having appeared in said action but failing to prosecute her claim is, therefore, in default.

The Court having heretofore made and entered its Findings of Fact does now making the following

CONCLUSIONS OF LAW

1.

That the plaintiff, Meryl W. Kirkevold, doing business as Barnes-Woodin Fur Department, be, and he is, hereby entitled to judgment against the defendant, Home Insurance Company of New York, a corporation, in the sum of Nineteen Thousand Eighty-six and 45/100 Dollars (\$19,086.45), together with his costs and disbursements herein incurred.

2.

That the third-party defendant, Dorothy Riggs, be held in default and be granted nothing by her answer.

3.

That all of the third-party defendants, or anyone claiming under or through them, are permanently barred and enjoined from asserting any claim of any kind or nature whatsoever against the plaintiff or the defendant herein for any loss suffered from the loss of furs, fur coats or articles trimmed with fur in that [459] certain fire in the Barnes-Woodin Fur Department on May 9, 1944.

Done in Open Court this 14th day of May, 1946.

CHARLES H. LEAVY,

U. S. District Judge.

Presented by:

VELIKANJE & VELIKANJE,

E. F. VELIKANJE,

Attorneys for Plaintiff.

O.K. as to form:

CHENEY, HUTCHESON &

GAVIN,

ELWOOD HUTCHESON,

Attorneys for Defendant.

[Endorsed]: Filed May 14, 1946. [460]

In the District Court of the United States for the
Eastern District of Washington, Southern Division

Civ. No. 210

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,
Plaintiff,

vs.

THE HOME INSURANCE COMPANY OF
NEW YORK, a Corporation,
Defendant,

CLARA HARBIN, MRS. WILLIAM McCLURE,
MABEL MILLER RAY, DOROTHY RIGGS
and MABEL G. SMITH and ERMA TUR-
NELL,

Additional Third-Party Defendants.

JUDGMENT AND DECREE

The above-entitled matter coming on regularly
for trial in open court before the Hon. Charles H.
Leavy, District Judge, on the 7th day of March,
1946, at Yakima, Washington, plaintiff appearing
in person and by his attorneys of record, Velikanje
& Velikanje, by E. F. Velikanje of counsel, and
defendant appearing by its attorneys of record,
Cheney, Hutcheson & Gavin, by Elwood Hutcheson
of counsel, and the Court receiving evidence, oral
and written, and the Court having heretofore made
and entered its Findings of Fact and Conclusions
of Law, and being fully advised in the premises;
it is, now

Here Ordered, Adjudged and Decreed that the plaintiff, Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, be, and he is, hereby granted judgment against the defendant, Home Insurance Company of New York, a corporation, in the sum of Nineteen Thousand Eighty-six and 45/100 Dollars (\$19,086.45), together with interest from date hereof until paid, together with plaintiff's costs and disbursements incurred or expended in said action; and, it is [461]

Further Ordered that the third-party defendant Dorothy Riggs be, and she is, hereby in default; and, it is

Further Ordered that all of the third-party defendants in the above-entitled action, or anyone claiming under or through them, are permanently barred and enjoined from asserting any claim of any kind or nature whatsoever against the plaintiff or the defendant herein for any loss suffered from the loss of furs, fur coats or articles trimmed with furs, in that certain fire in the Barnes-Woodin Fur Department on May 9, 1944.

Done in Open Court this 14th day of May, 1946.

CHARLES H. LEAVY,

District Judge.

Presented by:

VELIKANJE & VELIKANJE,

E. F. VELIKANJE,

Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1946. [462]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Home Insurance Company of New York, a corporation, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment in favor of the plaintiff entered in this action on May 14, 1946, and from the order denying defendant's motion for new trial and from each and every other adverse order, ruling and decision of the court herein.

CHENEY, HUTCHESON &
GAVIN,

/s/ ELWOOD HUTCHESON,

Attorneys for Defendant and Appellant, The Home Insurance Company of New York.

Copy mailed to attorneys for plaintiff June 19, 1946.

A. A. LaFRAMBOISE,

Clerk U. S. District Court.

By THOMAS GRANGER.

[Endorsed]: Filed June 19, 1946. [463]

[Title of District Court and Cause.]

ORDER FIXING AMOUNT OF
APPEAL BOND

Upon application of the defendant, It Is Hereby Ordered that the amount of supersedeas and cost

bond on appeal herein is hereby fixed in the total sum of \$22,000.00, Twenty-two Thousand Dollars.

Done in open court this 14th day of May, 1946.

CHARLES H. LEAVY,
U. S. District Judge.

Presented by:

CHENEY, HUTCHESON &
GAVIN,

By ELWOOD HUTCHESON,
Attorneys for Defendant.

O. K.

VELIKANJE & VELIKANJE,
E. F. VELIKANJE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1946. [464]

[Title of District Court and Cause.]

**SUPERSEDEAS AND COST BOND
ON APPEAL**

Know All Men By These Presents: That we, The Home Insurance Company of New York, a corporation, the defendant above named, as principal, and The Home Indemnity Company, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, the plaintiff above named, in the just and full sum of Twenty-

two Thousand and No/100 Dollars (\$22,000.00) for which sum, well and truly to be paid, we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of May, 1946.

The condition of this obligation is such, that whereas, the above named plaintiff on the 14th day of May, 1946, in the above entitled action and court, recovered judgment against the defendant above named for the sum of Nineteen Thousand Eighty-six and 45/100 Dollars (\$19,086.45), together with costs as taxed in the sum of \$28.40; [465]

And, whereas, the above named principal has heretofore given due and proper notice that it appealed from said judgment of the above entitled court to the Circuit Court of Appeals for the Ninth Circuit; and the court having heretofore entered an order fixing the amount of this bond in the above-mentioned sum;

Now, Therefore, if the said principal, The Home Insurance Company of New York, a corporation, shall pay to Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, the plaintiff above named, and shall satisfy in full the said judgment heretofore entered herein, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the said judgment is affirmed, and shall pay and satisfy in full such modification of the said judgment and such costs, interest and damages as the said Appellate

Court may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

THE HOME INSURANCE
COMPANY OF NEW YORK,
By ELWOOD HUTCHESON,
Its Attorney.

THE HOME INDEMNITY
COMPANY,
By A. U. HOELTING,
Its Attorney in Fact.

(Corporation Seal.)

The foregoing bond is hereby approved.

CHARLES H. LEAVY,
District Judge.

[Endorsed]: Filed June 11, 1946. [466]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

Defendant will rely upon the following points in the prosecution of its appeal from the judgment herein:

I.

The District Court erred in making the following rulings upon admissibility of evidence and in admitting the following evidence offered by the plaintiff:

1. In admitting in evidence plaintiff's exhibit 4.

2. In admitting in evidence plaintiff's exhibit 6.
3. In admitting in evidence plaintiff's exhibit 7.
4. In admitting in evidence plaintiff's exhibit 8.
5. In admitting in evidence plaintiff's exhibit A-1.

II.

The District Court erred in entering its findings of fact on the evidence as follows:

6. In making finding of fact number 5.
7. In making finding of fact number 6. and particularly finding therein that the fur garments destroyed in said fire were of the value therein stated, to-wit, \$27,415.00. [467]
8. In making finding of fact number 8.
9. In making finding of fact number 9.
10. In making finding of fact number 10.

III.

The District Court further erred as follows.

11. In making conclusion of law number 1 that plaintiff is entitled to recover judgment against the defendant in the sum of \$19,086.45 and costs.

12. The court erred in entering judgment in favor of the plaintiff against the defendant in the sum of \$19,086.45. and costs.

13. The court erred in denying defendant's motion for new trial.

14. The court erred in overruling each and all

of defendant's objections to plaintiff's proposed findings of fact and conclusions of law.

15. The court erred in making and entering judgment in favor of the plaintiff against the defendant for any sum in excess of \$1800.00.

16. The court erred in finding and holding that there was any storage room, within the meaning of the insurance policy, on the mezzanine floor of the Barnes-Woodin Department Store where the fire damage involved herein occurred.

17. The court erred in finding and holding that by reason of said fire any liability of the defendant arose under said insurance policy in excess of the sum of \$10,000.00, by reason of the limitation [468] in the insurance policy limiting said liability to the sum of \$10,000.00 as to any damages occurring outside of storage rooms, vaults and safes.

18. The court erred in finding and holding that defendant was liable as to any fur garment in excess of the agreed valuation thereof stated on the receipt issued by the plaintiff to the customer pursuant to the provision of the insurance policy involved herein.

19. The court erred in finding and holding that defendant was liable to plaintiff for any fur garments as to which no valuation was stated by the plaintiff on the receipts issued by him to his customers, as required by the insurance policy.

20. The court erred in finding and holding that defendant is liable to plaintiff as to any fur gar-

ments in excess of the amount stated on the receipt issued therefor in instances where insurance certificates were also issued as to said fur garments, and especially in instances where said receipts and certificates were issued at different times and for different amounts.

21. The court erred in finding and holding, with reference to fur garments which were replaced by the plaintiff, that the liability of the defendant is in excess of the wholesale cost to plaintiff of purchasing said replaced fur garments.

22. The court erred in finding and holding with reference to said replaced fur garments that the full amount of the gross profits of the plaintiff thereon should not be deducted in determining the amount of defendant's liability to plaintiff with reference thereto. [469]

23. The court erred in finding and holding that in determining the amount of liability as to said replaced fur garments that plaintiff is entitled to credit for any federal or state luxury or sales taxes with reference to said replaced fur garments, there having been no taxable sale thereof.

24. The court erred in finding and holding that plaintiff is entitled to any recovery against the defendant as to the replaced fur garments by reason of the fact that plaintiff failed to sustain his burden of proof to show with sufficient, specific, definiteness, and certainty the amount of his actual loss for

which he is entitled to recovery with reference thereto.

CHENEY, HUTCHESON &
GAVIN,

ELWOOD HUTCHESON,

Attorneys for Defendant and
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 19, 1946. [470]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above entitled Court:

Defendant designates the following as the record to be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of the above entitled case:

1. Summons.
2. Complaint.
3. Special Appearance.
4. Notice of intention to file petition and bond for removal.
5. Petition for removal.
6. Bond for removal.
7. Order of removal.
8. Notice of removal and filing of record in Federal Court.

9. Order granting motion to add additional parties.
10. Answer and counter-claim.
11. Reply.
12. Default judgment as to additional third-party defendants.
13. Admission. [471]
14. Order relative to pre-trial hearing.
15. Transcript of proceedings (in two volumes, including portion of proceeding at Tacoma on April 9, 1946, and all proceedings at Yakima on May 2, 1946).
17. All original exhibits to be transmitted to Circuit Court of Appeals without copying the same.
18. Order for transmission of exhibits.
19. Plaintiff's proposed findings of fact and conclusions of law (not entered by the court).
20. Motion for new trial and affidavit.
21. Minute entry at the court hearing at Tacoma, April 9, 1946.
22. Defendant's objections to plaintiff's proposed findings.
23. Plaintiff's answer to defendant's objections to plaintiff's proposed findings.
24. Order denying motion for new trial.
25. Findings of fact and conclusions of law.

26. Judgment and decree.
27. Notice of Appeal, together with date of filing thereof and record of mailing thereof.
28. Order fixing amount of appeal bond.
29. Supersedeas and cost bond on appeal.
30. Designation of record.
31. Appellant's statement of points.

CHENEY, HUTCHESON &
GAVIN,
ELWOOD HUTCHESON,
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 19, 1946. [472]

[Title of Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing type-written pages, numbered 1 to 473, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein, as called for by the designation of record on appeal filed by counsel for the defendant,

as the same remains on file and of record in my office, and that the same constitutes the record on appeal of the defendants, The Home Insurance Company of New York, from the Judgment and Decree of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify that included in the transcript of record on appeal is contained all original exhibits except plaintiff's exhibit 3 which is transmitted separately. Said original exhibits being transmitted pursuant to order of the District Court.

I Further Certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$48.30, and that the same has been paid in full by Elwood Hutcheson, attorney for Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 5th day of July, 1946.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

[Endorsed]: No. 11376. United States Circuit Court of Appeals for the Ninth Circuit. The Home Insurance Company of New York, a Corporation, Appellant, vs. Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed July 8, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11376

THE HOME INSURANCE COMPANY OF NEW
YORK. a Corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as Barnes-
Woodin Fur Department,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Comes now The Home Insurance Company of
New York, appellant above named, and for its

Statement of Points upon which it intends to rely in this appeal adopts the Statement of Points filed by it in the United States District Court in connection with its notice of appeal and included in the transcript of record prepared and certified by the Clerk of the said District Court.

Appellant designates the entire record herein other than exhibits to be printed and also that the following portions of the exhibits herein be printed: Plaintiff's exhibits 1, 2 and 3, and Defendant's exhibits A and the first typewritten page of B-1.

CHENEY, HUTCHESON &
GAVIN,

ELWOOD HUTCHESON,
Attorneys for Defendant and
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed July 8, 1946. Paul P.
O'Brien, Clerk.

IN THE
**United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,

Appellee.

No. 11376

*UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION*

BRIEF OF APPELLANT

CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
JOHN GAVIN
WALTER J. ROBINSON, Jr.

Attorneys for Appellant
426 Miller Building,
Yakima, Washington

PAUL P. GIBBEN,
CLERK

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JURISDICTION

This action was removed to the federal district court by reason of diversity of citizenship. U.S.C.A. title 28, sec. 41(1), 71, 72. Plaintiff is a resident of the State of Washington; defendant is a corporation incorporated in the State of New York; and the amount sued for was \$22,495.00, exclusive of interest and costs. (R. 3-20).

The case comes within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions at law or in equity. U.S.C.A. title 28, sec. 225. Final judgment and decree was entered in the district court on May 14, 1946. Notice of appeal therefrom was filed on June 19, 1946. (423-425).

STATEMENT OF THE CASE

This is an action brought by appellee, Meryl Kirkevold, doing business as Barnes-Woodin Fur Department, against appellant, The Home Insurance Company of New York, to recover upon an inland marine insurance policy for the destruction of customers' fur coats in appellee's custody, by a fire on May 9, 1944, at 5:35 o'clock p. m., on the mezzanine floor of the Barnes-Woodin department store, at Yakima, Washington.

The case was tried to the court without a jury. The court made findings, denied defendant's motions for judgment and for new trial, and entered judgment and decree

in favor of plaintiff in the sum of \$19,086.45 and costs. Defendant appeals.

It appeared from appellee's complaint that he had made no settlement with six of the fur coat owners, Clara Harbin, et al, and consequently appellant before filing its answer upon motion procured an order of the court adding those six persons as additional third-party defendants. Appellant thereupon served and filed its answer and counter-claim for interpleader as to appellee and said additional third-party defendants, appellant having reserved \$1800.00 of its admitted unpaid liability. However only one of said additional third-party defendants entered any appearance and none of them appeared at the trial, for the reason that each of them held other insurance and received payment therefrom (22-36, 146, 326). Consequently the court entered judgment of default as against them; and no issue as to them or as to appellant's counter-claim for interpleader is involved on this appeal.

No rights of any customers or fur coat owners are involved herein. Aside from the six coat owners who were made additional parties defendant and defaulted, appellee, prior to the commencement of this action, made settlement with all of the owners of damaged fur garments, either by cash payments or by replacing their fur garments. The issues herein are solely between appellee Kirkevold and appellant.

Appellant conceded liability by reason of said fire in the sum of \$10,000.00, of which it paid \$8200.00 to appellee prior to the commencement of this action. (7, 385) Appellant very definitely contends, however, that it is not liable for more than the remaining balance in the sum of \$1800.00 (less of course its costs in both courts). Appellant's contentions and the issues herein are based upon the hereinafter quoted provisions of the insurance policy contract, which imposed several express and very definite restrictions and maximum limitations upon the amount of appellant's liability.

The basic facts of this case—as distinguished from the inferences and conclusions to be drawn therefrom—are for the most part not substantially in dispute and may be summarized as follows:

The Barnes-Woodin department store is situated at 301 East Yakima Avenue, in the heart of the business district of Yakima, Washington. It was sold by the Barnes-Woodin Company to C. C. Anderson Company, of Boise, Idaho (a subsidiary of Allied Stores, of New York), effective as of May 1, 1944, eight days before the fire. (238) Both prior and subsequent to said sale, appellee Kirkevold, through a continuing arrangement with said store, owned and operated the fur department therein, situated partly on the mezzanine floor and partly on the second floor of the store.

On August 17, 1942, appellant issued to appellee this insurance policy contract termed "Furriers-Customers Basic Policy," being No. FC-1824, which was in effect at the time of the fire, and which contained the following important provisions:

"FURRIERS-CUSTOMERS CUSTODY RIDER

"This policy only covers Furs, or garments trimmed with Fur, being the property of customers, accepted by the Assured for storage, alteration, repairing, cleaning or remodeling and for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property, but excluding any stock belonging to the Assured or to any subsidiaries or affiliates of the Assured.

"This policy covers during transportation or otherwise while the property is in the custody or control of the Assured for alteration, repairing, cleaning, remodeling, or preparation for storage or for return to customers; and while in storage rooms, vaults or safes at locations hereinafter described.

"This Policy Insures:

"Against all risks of loss of or damage to the insured property including the Assured's legal liability therefor, except as hereinafter provided . . .

"2. This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit

of liability as stated below for the location at which such casualty occurs:

"Limits of Liability

<i>"In storage rooms, vaults and safes</i>	<i>Outside of storage rooms, vaults and safes</i>
<i>\$100,000.00</i>	<i>\$10,000.00</i>

Locations

*at 301 E. Yakima Avenue,
Yakima, Washington*

nor for more than \$5000.00 while at any other location not used by the Assured for storage, nor for more than \$5000.00 while in transit.

"3. It is warranted by the Assured that an accurate record will be kept of all receipts issued showing the customers' name, address and description and stipulated amount on each article included therein, which record shall be open for inspection by duly authorized representatives of this Company at all reasonable times during the policy period and for one year thereafter." (Pltf. Ex. 1; 44-54).. (All italics herein are ours.)

Appellant contends that under the plain terms of said contract its liability was definitely limited in the following respects:

1. The customers' fur coats destroyed in said fire were situated *outside of storage rooms, vaults, and safes*. Consequently appellant's total liability could not in any event exceed the sum of \$10,000.00. Appellant is therefore not liable for more than \$1800.00, in addition to the \$8200.00 heretofore paid by it to appellee.

2. Moreover as to any particular customer's fur coat

or garment appellant's liability *cannot exceed the amount stipulated in the receipt* issued by appellee to such customer as applying to said fur garment.

3. Appellee made settlement with all of the owners of damaged fur coats, except the six additional third-party defendants hereinabove referred to. Numerous settlements were made in cash for the amounts shown on the releases signed by the customers. (Pltf. Ex. 3; 68) Numerous other settlements were made by replacing the destroyed fur coats. As to the latter, appellant's liability to appellee under the contract *cannot in any event as to any particular coat exceed the cost to appellee, a fur coat merchant, "to repair or replace the article with materials of like kind and quality."*

4. In the instances where cash settlements were made naturally appellant's liability to appellee *cannot exceed the amounts paid by appellee in making the settlement* with the coat owners, as shown by the releases signed by them and delivered to appellee. (Pltf. Ex. 3; 68)

5. Nor can appellant's liability as to any coat exceed the *amount claimed therefor in the proof of loss* filed by appellee with appellant, which itemizes the amount claimed as to each customer's fur coat. (Pltf. Ex. 2; 58-66).

The judgment entered by the trial court seriously violates each of the foregoing maximum limitations upon

appellant's liability, both collectively and as to each particular coat, to which limitations appellant is under the contract clearly entitled.

It is undisputed that the uppermost rider or endorsement attached to the policy as introduced in evidence, increasing the policy limits, was issued and attached to the policy subsequent to this fire. (44, 55).

The policy also provided and it was arranged that a fur coat customer might, upon payment of an additional consideration, obtain from appellee the issuance of appellant's "certification of insurance on furs", sometimes referred to as "insurance certificate" or "floater policy." The advantage thereof to the customer was that the same gave insurance protection for the coat *at any location*, whether or not in the custody of this store. Thirteen of the owners of coats damaged in this fire held such certificates. (137). The term "Assured" in the policy refers to appellee. The policy contains the following endorsement or rider with reference to these certificates:

"FURRIERS' CUSTOMERS CERTIFICATION ENDORSEMENT

- "1. This policy is extended to cover during transportation or otherwise such Furs or garments trimmed with Fur, the property of customers, for which the Assured has issued a Certification of Insurance, on form approved by this Company. No Certification of Insurance issued shall cover beyond the time the ownership re-

mains vested in the person to whom issued, nor shall any Certification be issued for a period longer than twelve (12) months from the date of issuance.

"2. It is agreed by the Assured that Certifications of Insurance *shall be issued only in combination with annual storage agreements at a combined storage and insurance charge*, and that the rate and premium applying to this insurance shall not be stipulated as such on any Certification, bill, circular or advertising matter.

"3. The additional premium for the insurance granted by this endorsement shall be computed at the rate of Fifty (50c) cents per \$100 per annum of the amount stipulated on each Certification issued. Such additional premium to be paid monthly on or before the 15th day of the month following the issuance of such Certifications.

"4. The Assured agrees to forward to this Company or its Agent at the close of each business day copies of all Certifications issued.

"5. The cancellation of this policy shall not affect any risk then pending under Certifications issued by the Assured as herein provided. It is understood and agreed that any one or all Certifications may be cancelled at any time by the Company, giving five (5) days' written notice thereof, mailed to the address of the person to whom issued as stated in the Certification, and unearned portion of paid premium to be returned to the Assured.

"Subject to all terms, conditions and warranties of the policy and its rider to which this endorsement is attached.

"Attaching to and forming part of Policy No. FC 1824 of the HOME INSURANCE COMPANY." (Pltf. Ex. 1; 45-47).

The policy further provides:

"This policy is made and accepted subject to the foregoing stipulations and conditions and to the conditions printed on the back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached." (Pltf. Ex. 1; 51).

The policy contained no such written waiver agreements or attachments.

The material portion of the form of "Certification of Insurance on Furs" issued by appellee to its customers on request pursuant thereto is as follows:

"CERTIFICATION OF INSURANCE ON FURS.
"POLICY NO. F.C.-1824."

"This certifies that..... (CUSTOMER)
..... (STREET ADDRESS)
..... (CITY AND STATE) is insured under
the above designed policy against all risks of loss of
or damage to the Fur garments below scheduled, ex-
cept as hereinafter provided, covering for twelve (12)
months from date hereof, provided such garments re-
main the property of said customer, *subject in all res-
pects to the terms and conditions of said policy issued
by*

THE HOME INSURANCE COMPANY, NEW YORK
TO

MERYL KIRKEVOLD DBA BARNES-WOODIN FUR

DEPT., YAKIMA, WASHINGTON Assured . . .

"The insurance evidenced by this Certificate is *cancelable by the Company in accordance with the terms of said policy*. In event of loss, immediate notice must be given in writing to the Company or the Assured named above. Failure to file proof of loss within ninety (90) days from the date of loss invalidates claim. *Any loss may be adjusted by the Company with the assured or with the holder of this Certificate.*

"No suit or action is maintainable under the policy unless *all terms thereof* are complied with.

Items Covered	Description	Amount of Insurance.....
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"STORAGE PRIVILEGE—

"The Assured agrees to accept for storage for a consideration, the property above described, at such time and for such period within the term of this Certification as the holder thereof may elect, *at any agreed value* as of this date corresponding to the amount of insurance for each of the items covered hereby, as indicated above, and *subject to the terms and conditions of its standard storage receipt*, which will be issued for said property when same is delivered to it.

BARNES-WOODIN FUR DEPT. Signature of Assured."
(Pltf. Ex. 3; 68).

The only storage room or vault for the storage of fur garments was situated on the second floor of said store. Approximately 600 fur coats were stored there at the time

of the fire. (164) This storage room was at all times kept locked and subject to refrigeration or air-cooling machinery. (165). As is well known, the Yakima Valley is during summers an extremely hot, dry, arid district, so that cooling is necessary for proper storage of furs. (165, 166, 283). There were no refrigeration or air-cooling devices whatever on the mezzanine floor of the store. (165).

IT IS UNDISPUTED THAT NONE OF THE FUR COATS IN THE STORAGE ROOM ON THE SECOND FLOOR OF THE STORE WERE IN ANY WAY DAMAGED BY THE FIRE. THE ONLY FUR COATS DAMAGED BY THE FIRE WERE SITUATED ON THE MEZZANINE FLOOR. THE DAMAGED COATS WERE NOT SITUATED IN ANY STORAGE ROOM, BUT WERE IN APPELLEE'S WORK ROOM. (118, 164, 167, 186).

The mezzanine floor of the store was reached by a stairway ascending from the main street floor of the store. The space on the mezzanine floor to the left or west at the top of this stairway was used as a "sales room" for the sale of new fur coats. This space, however, was not a separate room, but was merely part of the open space of the store proper on the mezzanine floor. It was not partitioned off in any manner from the rest of the main store. (161-162, 252-253, 269).

Adjacent to and immediately to the west of this sales space was the work room or fitting room, being the space

in question. It was in this latter room that the fire originated, and through the prompt and diligent efforts of the city fire department, the fire was for the most part confined to that room. All of the fur garments destroyed or damaged in the fire were situated in the latter room, namely, this work room. (118, 164, 167, 186).

Along the southerly edge of the mezzanine floor there was a partition between the work room and the remainder of the store. There was so such partition between the sales room and the remainder of the store. There was no door between the sales room and the work room, but merely an opening or passageway about four feet wide covered by a curtain or drape with an opening through which people readily walked. (161-2, 269-70, 276-7) There was no wall between the sales room and the work room, but merely show cases in which new fur coats which were for sale were hanging in the sales room. (162, 269-70, 276-7).

The work room was a rather irregular shaped room, of which the easterly portion contained various sewing machines, tables, chairs, etc., and was used for repairing, remodelling, and fitting fur garments. The garments were temporarily hung in the westerly portion of the work room, usually for several weeks during the busy season, until they could be reached to be worked upon. It was customary to carefully examine and do some repair work upon each fur coat before placing the same in storage. *It is undisputed that*

no partition of any kind separated the said easterly and westerly portions of this work room. (160, 219-20, 272-3).

It is also undisputed that after completion of the repair work on each fur coat, the fur garments that were left for storage (as distinguished from those which were brought in for repairs only) were thereupon always placed "in storage" in the storage room upstairs on the second floor of the store. (121-4, 126, 166-7, 182, 201, 206, 220, 224-5, 228-31, 234-6, 282-3).

It was customary to refer to the coats as "in storage" only after they had been placed in the storage room on the second floor. (229).

An abnormally large number of fur coats had been received due to the coming of warmer weather shortly before the fire, and the same were then hanging in the work room waiting to be worked upon and then placed in storage in the storage room on the second floor. (135, 173)

Also appellee was then spending most of his time at his war-time ranch (probably to obtain an agricultural classification exemption) and he and his employees were not keeping up with their work. (135, 175, 186, 320).

Shortly prior to the issuance of this policy appellee signed in two places and submitted to appellant his written application for the policy, *which in two places definitely stated that he had only one place for storage of customers'*

fur garments, and that the same was not on the mezzanine, but was on the second floor of the store. This application (Deft. Ex. A; 169-171, 187-189) provided:

“... 6. Locations (all) used for storage of Customers' Property;

Address	Floor	Building or Section	Operated By
A. 301 E. Yakima Ave., Yakima, Wn.	2nd		Barnes - Woodin Fur Dept.
B.			
C.			
D.			

“NOTE: Separate “Description of Storage Enclosure and Location” Rider must be completed for each Storage Enclosure, except where storage is at premises NOT operated by Proposer; then it may be omitted unless or until specifically requested by Company.

“7. With respect to storage location NOT OPERATED BY PROPOSER, specify,

(a) Those at which a separate storage enclosure is maintained for Proposer's exclusive use (*this refers to an entire vault or room, not to a stall or other subdivision thereof*.....
.....

(b) Any which may be in same building (but under a different street address) with Proposer's principal place of business.....

INSURANCE

“Section Two

(Forms and Limits needed)

"1. BASIC POLICY (Custody form only):

Limits of Liability:

(a) *At Locations where Customer's Property is Stored*

"Location	In Storage Enclosure	Outside Storage Enclosure
301 E. Yakima Ave.....	\$100,000.....	\$ 10,000.....
.....	\$.....	\$.....
.....	\$.....	\$.....
.....	\$.....	\$.....

"(b) *At Location NOT USED for STORAGE*

Proposer's Premises	\$.....
While in Transit	\$5000
At Any Other Location	\$5000

"... Signing this Proposal does not bind the Proposer to complete the insurance, but it is agreed that the information contained herein and in the "Description of Storage Enclosure and Location" Rider (S) attached hereto shall be the basis of the contract should a Policy be issued. If any of the questions therein have been answered fraudulently, or in such a way as to conceal or misrepresent any material fact or circumstance concerning this insurance or the subject thereof, the entire Policy shall be void.

"I/We have read the above and the "Description of Storage Enclosure and Location" Rider (S) attached hereto and agree that to the best of my/our knowledge and belief same fully represents the true statement of facts.

(Signed) MERYL W. KIRKEVOLD,
Signature of Proposer
Owner
Title

Date 8/20/42

"ATTACH DESCRIPTION OF STORAGE ENCLOSURE AND LOCATION RIDER(S) HERE.

"DESCRIPTION OF STORAGE ENCLOSURE AND LOCATION

(To be attached to Furrier's Customer's Proposal)

"Description of Storage Location at 301 E. Yakima Ave. is as follows:

1. STORAGE LOCATION GENERALLY:

Construction of Building (i. e., Frame, Brick, Mill, Reinforced Concrete, etc.) B Class Bldg. Page 91, line 17.

On which floor is storage enclosure located (i. e., basement, first, second, etc.) Second.

". . . 3. STORAGE ENCLOSURE ONLY:

(a) Size..... Width 20, Length 20, Height 12.

(b) Number of Openings: Doors, 1; Windows..... Vents.....

(c) Construction of Walls, Floor and Ceiling:

Material	WALLS	FLOOR	CEILING
"Wood and/or Plaster	Thickness	Thickness	Thickness
Board	6 inches	12 inches	12 inches
		OUTER DOOR	INNER DOOR
". . . (d) <i>Description of Doors of Storage Enclosure</i>		<i>ordinary with steel covering</i>	
(a) State type (ordinary, refrigerator, fire or vault).....			
(b) Name of Manufacturer.....			
(c) State classification of Underwriters Label.....			
(d) If refrigerator or fire door state thickness		inches	inches
(e) If Vault Door			
(1) State thickness of steel exclusive of bolt work		$\frac{1}{4}$ inches	inches
(2) Is door equipped with combination lock?.....		no	
(3) Lock Manufacturer's Name and Number.....			
(f) <i>If not equipped with combination lock, describe lock</i>		<i>Key lock Sargent</i>	

Date 8/20/42

MERYL W. KIRKEVOLD,
Signature of Proposer"

This conclusively shows the intention of the parties that the coverage should not exceed \$10,000.00 as to furs outside of the storage enclosure on the second floor. Also that only entire enclosed rooms and not subdivisions of rooms should be considered.

Appellee admitted that the said room description referred to the second floor storage room and not the mezzanine. (188-9).

The receipt issued by appellee to Mrs. F. C. Dawson listed her three fur garments and stated that the third garment was "*in storage.*" This referred to her coat which was in the storage room on the second floor and was undamaged by the fire. Her other two coats were in the work room on the mezzanine floor and were seriously damaged by the fire. (Pltf. Ex. 3; 68).

The same is true as to the three fur garments of Mrs. David Thomas. Appellee issued to her a receipt which states that her third garment was "*in storage.*" This was her coat which was in the storage room on the second floor and was undamaged by the fire. (Pltf. Ex. 3; 68).

Appellee also introduced in evidence a letter from another customer, Mrs. A. K. Warner, which stated that she understood her coat had been left there only on May

6 (three days before the fire) and that it had not yet been placed "*in storage.*" In other words, it was still being held in the work room for repairs *and for preparation for storage.* (Pltf. Ex. 3; 68).

A few days after the fire appellee admitted to Ralph B. Sinclair, one of the insurance adjusters, that his \$10,-000.00 insurance coverage was insufficient to cover the amount of the loss of customers' fur coats in the fire. Kirkevold also stated to Sinclair that he was going to ask Mr. Orkney, the agent through whom the policy was issued, to request the insurance company to make up the difference between the amount of the insurance and the amount of the actual loss, if possible. He further stated that he expected to make profits on replacements of damaged fur coats, which would partially, at least, reduce or offset the deficiency remaining between the amount of the fire loss and the amount of the insurance coverage. (254-258, 262, 263).

Appellee's own testimony conclusively shows that these damaged coats were in the work room. He testified:

"Q. Now, Mr. Kirkevold, where were these coats at the time they were destroyed?

"A. At the time when the coats were destroyed, was *in our working quarters*, and also a room where we had coats hanging ready to be worked on."
(118)

This room where the damaged fur coats were was re-

peatedly, expressly, and definitely designed by appellee himself as "*the work room.*" (118, 120, 124, 160-1, 167, 186, 196-7, 201, 235, 270-1) Kirkevold also so designated the room on the diagram of the mezzanine floor. (Pltf. ex. 5; 159-60).

Kirkevold testified:

"The room upstairs was reserved for storage—paid storage." (122)

"Q What you call the cash paying, or permanent storage room was on the second floor?

"A. Yes." (124)

Appellee admitted, and it is undisputed that aside from the receiving room or shipping room in the basement and the space for cleaning fur coats on the second floor—in each of which coats were never kept more than a few hours, and there were never more than a very few coats there at any time—the only places in the entire store where customers' fur coats were ever kept were this work room on the mezzanine floor and the storage room on the second floor. (129, 130, 176-7).

The cause of the fire has never been definitely determined, although probably due to an employee's lighted cigarette. (176, 215). Appellee had four employees working in the work room where the fire started and where all of the damage occurred. *There were no employees in the*

storage room upstairs on the second floor; and that room was kept locked. The store closing time was 5:30. The fire started immediately afterward. (57, 175, 176).

After the fire, appellee increased the amount of his insurance coverage outside of the storage room. (Pltf. ex. 1 rider; 44, 55, 133, 183). Of course, however, this did not aid him as to this fire.

Appellee on redirect examination further testified, relative to certain pictures of the store interior:

“Q. I hand you 9-B, showing some dummies in the middle of the picture. Were those dummies normally in that position?

“A. No.

“Q. Where would they be?

“A. They would be over in this portion of *the work room*.

“Q. *In your work room?*

“A. Yes.

“Q. And that shows the partition you built along the balcony in 1943?

“A. Yes.

“Q. And those were the coats that were being worked on that you referred to, a rack being worked on?

“A. Yes.

Q. These would be the sewing machines?

"A. Yes.

"Q. Handing you 9-D, where would that be taken from?

"A. Oh, this is the picture that you just showed me, only it is from the other end. I mean, it is *the other end of the room*.

"Q. You mean, this would be *in your storage room*?

"A. No.

"Q. *That is a picture of the work room*?

"A. *Work room.*" (196, 197).

Kirkevold further testified:

"Q. *Well, it was very evident that the fire was in the work room, wasn't it?*

"A. *Well, that is where all of the damage was done.*" (186).

Mrs. Hazel Fiebelkorn, one of appellee's employees in the work room, and one of his witnesses, testified:

"I work in *the work room* . . .

"Q. Were you in charge of *the work room*?

"A. Yes . . .

"Q. And then what would be done with it?

"A. Well, it would probably be worked on or whatever

had to be done to it, and finished up, *and put in storage.*

"Q. *And put in storage where?*

"A. *On the second floor . . .*

"Q. Let us say that a coat was brought in, not for permanent—not summer storage, but for repair, state what would be done with that coat?

"A. It would probably be *hung back there in the work room until we were notified as to what she wanted to do, come in and get it or for storage.* It would probably hang there until they showed us about it . . .

"Q. Were coats ever taken directly up to the upstairs storage, pending the time of repairs and cleaning?

"A. You mean, *when they were brought in, taken right up to storage?*

"Q. Yes.

"A. No." (221-225; 229).

Mrs. Bernice Stevens, appellee's saleslady since April, 1943, (232) testified:

"Q. Are you familiar with the processing of them (fur coats) *before they are put into storage?*

"A. Yes.

"Q. *Are coats put directly into storage?*

"A. No.

"Q. What is done to them?

“A. They are inspected for various things, for loose buttons, loose linings, they would be re-tanned.

“Q. Are those all things necessary, that are *necessary before they are placed in storage* upstairs?

“A. Yes.” (234)

Kirkevold also admitted that coats which were brought in merely for repairs and alterations, and not for storage, remained in the work room on the mazzanine floor, and were never taken upstairs to the second floor. (122, 325)

It is undisputed and not denied by Kirkevold that in his conversations with Mr. L. M. McKinley, the adjuster who later investigated this loss, Kirkevold always referred to this room as the work room and never as a storage room. (270, 271).

This policy was delivered to appellee shortly after its issuance, almost two years before the fire. He had requested and consented to the \$10,000 coverage. (169, 298-300) He never made any objections thereto, and until after the fire never requested any changes therein. (300).

It is undisputed that it is always customary in insurance policies of this nature that the amount of the coverage in storage rooms, vaults, and safes, is always very much greater than the amount of insurance coverage outside of storage rooms, vaults, and safes. (317).

Neither appellant nor its local agent, Mr. Orkney, ever

had any knowledge that the value of customers' coats on the mezzanine floor ever exceeded \$10,000.00. (322)

The court permitted appellee to make a vague speculative guess based on pure conjecture that of the customers' fur coats which were destroyed in the fire, 75% were situated in the west end of the work room, which the court erroneously held was a storage room, and 25% were in the east end of the work room, which the court classified as a work room; and the court made such a finding (9). (125, 126, 419). Appellee, however, admittedly spent the day of the fire out at his ranch, and was not even at the fire at all until after the fire had been extinguished. (175, 176, 186, 320). He testified:

"Q. After the mess of the fire it was impossible to tell what coats were where, is that correct?"

"A. Yes. (125, 126)."

On redirect examination appellee identified a photograph of some of the burned coats (Pltf. Ex. 10) and testified:

"Q. Handing you identification 10, what is that?"

"A. These are coats that the firemen took out and threw on the stairs after the fire, or during the fire."

"Q. Is that one reason why you are unable to determine what coats were where, and how many were"

in the work room, and how many were in the store room?

“A. Yes.” (197)

Appellee’s employee, Mrs. Hazel Fiebelkorn, in response to a leading question, testified: “*I imagine*” that 20 or 25 % of the coats destroyed were in the east end of the work room. (224)

Appellee’s only other employee who testified, Mrs. Bernice Stevens, admitted that she had no knowledge and could not even make a guess as to the relative percentages in each end of this room. (233)

The testimony of Mr. Sinclair and Mr. McKinley, the insurance adjusters, also conclusively establishes that after the fire things were in such a confused “mess” that even if it were material, which we deny, it was wholly impossible to make any reasonably accurate estimate as to the amount of the damaged or destroyed fur coats which were situated in the east and west ends of the work room. (251, 261, 269)

Appellee, in his conversations with the adjuster, always referred to this as the work room, rather than the storage room. (270, 271)

At the last hearing in the district court, the court, referring to this issue, said:

“If we take your general statement, they had a right

to contest the issue, which is not an open and shut issue at all.

“Mr. Velikanje. That is right.” (345, 346).

It is undisputed that the practice was that when a customer brought in a coat, appellee's employees issued a receipt, and delivered the original thereof to the customer, and retained a carbon copy. The insurance policy required that this receipt in each instance show the agreed valuation of the coat, and the policy provided that appellant's liability could not exceed such valuations stated on the receipts. This was usually done, but there were numerous instances involved herein where appellee and his employees, by mistake, failed to write any valuation on the receipt issued by them and delivered to the customer. (146, 154, 236-7). This fact was unknown to appellant until after the fire. Appellee made a monthly report to appellant, which merely showed the total valuations on receipts outstanding at the end of each month. The receipts, however, were never sent to nor seen by appellant or any of its representatives. (138, 142, 183-5, 305-6, 319-20, 322).

The pre-trial order prepared by appellee's counsel and entered by the court pursuant to agreement of counsel provided:

“ . . . That no claim will be higher than the valuation set forth on the receipt issued to coat owners, except

in the case of those coats upon which there was a separate policy with the company." (38)

As to the latter the issue was reserved for decision by the courts.

Notwithstanding this clear and unequivocal provision of the pre-trial order, and the above quoted provision of the policy, the district court held that appellee could recover the full value of the destroyed coats in all instances, even though the receipts issued to the customers stated no valuation whatever. We contend that manifestly in such cases appellee cannot recover anything by reason of his failure to comply with the mandatory requirements of the insurance policy.

Appellee's minimum charge to a customer for summer storage of a fur coat was \$3.50, which entitled the customer to a \$200.00 valuation on the receipt. If the customer desired a larger valuation and larger insurance protection, there was an additional charge. These sums were, of course, retained by appellee, and were substantially greater than the premium rate paid by appellee to appellant. (136-7, 149).

Also, unknown to appellant, in numerous instances appellee and his employees made mistakes in issuing receipts and insurance certificates upon the same coats at different times and for different amounts. (142, 147, 237).

At the argument of the motion for new trial, appellee's counsel agreed, in open court, that the recovery on the Belair coat should not exceed \$325.00, the amount stated on the Belair receipt. (342, 343). However, over our objection, judgment was erroneously entered thereon for \$350.00. (403).

For the assistance of this court, we requested the court and counsel to make findings showing the amount of recovery allowed as to each coat. (385, 410, 411; also 353, 354). The court, however, refused to do so. The record includes, however, a previous draft of the findings of fact prepared by counsel for appellee, which, although not entered by the court, shows an itemized list of the amount of recovery claimed and allowed as to each coat. (402-407).

Appellee conceded that he was not claiming in any instance more than the amount he paid to the coat owner in settlement. (135, 136).

Referring to the numerous instances in which appellee made settlement with customers by replacing their destroyed coats (149) as distinguished from cash settlements, it is undisputed that appellee's rate of gross profit on fur coats was 41.78 %; in other words, his wholesale gross cost was 58.22% of the retail selling price or value. (172, 356, 359, 371, 376). Also his rate of net profits, taking into consideration all costs and expenses applicable to such replacements, was 25%. (377, 379).

As to the Mrs. J. D. Moore Russian squirrel coat, for example, appellee testified that the wholesale cost to him was \$150.00, and that that was the amount he was claiming herein. (101).

Appellee's income tax return shows the relative costs in connection with his business. (Deft. ex. B-1; 172, 376). Appellee conceded, however, that as to these fur coat replacements he did not pay and was not required to pay rent to the store (which was on the agreed basis of $12\frac{1}{2}\%$ of his sales of new coats), nor commissions to employees. (360-363, 366, 367, 373, 374).

The total of the cash settlements paid by appellee to his customers, shown by the written releases signed by them, which are exhibits herein, is \$14,106.04. (Pltf. ex. 3; 68; 386).

It is also undisputed that in connection with replacements of coats destroyed some of the customers desired better coats and paid the total sum of \$4,712.47 cash to appellee for that purpose. (382). The court erroneously held that appellee had a right to deduct therefrom a 20% federal luxury sales tax in the sum of \$3,561.46, the difference being \$1,151.01. (382). Admittedly, however, appellee did not collect any taxes from customers and did not pay any taxes with reference to these replacement transactions. (367, 370, 371). Obviously these transactions con-

stituted replacements and not sales, and hence are not legally subject to a sales tax nor a luxury tax on sales.

Appellee claims that the retail price of the coat replacements was \$17,567.62. (378, 383, 384). Deducting therefrom the 25% net profit leaves \$13,175.71. Deducting therefrom the amount of customers' cash payments on replacements, \$4,712.47, which is admittedly included therein, leaves \$8,463.24. (382).

However, it is our contention that the correct method of computation is as follows: Deducting from the \$17,567.62, 41.78% gross profit leaves \$10,227.87. Deducting therefrom the said customers' cash payments, \$4,712.47, leaves \$5,515.40. It is our contention that under the terms of the policy the latter figure represents the maximum amount of possible recovery herein as to replaced coats, aside from the over-all \$10,000.00 maximum limitation.

After deducting the sum of \$8,200.00 admittedly paid by appellant, (7, 184, 186, 385) the court erroneously entered findings and judgment in favor of appellee in the sum of \$19,086.45 and costs; from which defendant appeals. (416-425).

SPECIFICATION OF ERRORS

The district court erred:

1. In admitting in evidence plaintiff's exhibit 4, the

the same being a purported assignment from the Utah Fire Insurance Company to appellee relative to the G. F. McGilvery coat; as no payment was made thereon by appellee, the assignment was without consideration, and no proof of execution thereof. "If there has been no payment made, we object to the assignment by her without consideration for it, and not so far as the assignment is concerned . . ." (98 and see p. 81 et seq. of typewritten record).

2. In admitting in evidence pltf. ex. 6, being certain advertising literature in the form of a mimeographed circular issued by appellee. "Objected to as immaterial, irrelevant, and incompetent, purely a self-serving declaration of the plaintiff himself, and has no probative value whatever." (127).

3. In admitting in evidence pltf. ex. 7, being a newspaper advertisement published by appellee on June 9, 1944, one month after the fire. "That is objected to as incompetent, irrelevant, and immaterial, and purely a self-serving declaration, not binding on the defendant in any way." (128).

4. In admitting in evidence pltf. ex. 8, the same being a small notebook containing a purported list of various insurance policies, alleged to have been written and delivered by Mr. James Orkney, of Hargreaves and Orkney, appellant's local agent at Yakima, the amount of this policy having been therein erroneously referred to as \$100,000.00.

“That is objected to as incompetent, irrelevant, and immaterial . . . is wholly immaterial so far as proving any issue in this case is concerned, or showing anything within the authority of an agent of the insurance company . . . Since the issuance of the policy is not in dispute, I don’t think that proves anything.” (131).

5. In admitting in evidence pltf. ex. A-1 introduced by plaintiff at the subsequent hearing more than a month after the trial of the action, without being identified by testimony, the same being a notebook containing various figures and self-serving notations made by appellee and alleged by appellee to contain figures having a bearing upon the determination of the cost to appellee of replacements of the fur coats as to which settlements with customers were made by replacements. “Objected to as not properly identified.” (388).

6. In making finding of fact No. 5, that appellee had complied with all the terms and conditions of said policy; which is erroneous for the reason that it is undisputed that he did not do so, but wrongfully issued certificates for larger amounts than the valuations shown on receipts, and at different times, and also he omitted valuations on numerous receipts issued, all of which was contrary to the terms and conditions of the policy. (409, 417).

7. In making finding of fact No. 6, and particularly finding therein that the fur garments destroyed in said

fire were of the value therein stated, to-wit, \$27,415.00, and that the fire was not the result of negligence of appellee's employees. (418). In addition to other objections thereto, the same is not supported by the evidence, and the said figure should be at least \$25.00 less, or \$27,390.00, in view of the fact that at the argument of the motion for new trial appellee's attorney conceded that the liability on the Belair coat could not exceed \$325.00 rather than \$350.00. There was no proof as to the cause of the fire. Also said sum is greatly in excess of the total amount of the valuations stated on the receipts, as well as the amounts stated in appellee's proof of loss and the releases signed by customers. (Pltf. ex. 2, 3, 58-66, 68).

8. In making finding of fact No. 8, with reference to the thirteen customers who suffered loss in said fire who held special certificate policies, as the same is not supported by the evidence. (419).

9. In making finding of fact No. 9, that 75% of the customers' fur garments destroyed in the fire were situated in "a storage room" and 25% thereof were situated "outside of a storage room, vault, or safe" at said place of business, and that 75% of said loss is therefore charged against the \$100,000.00 provision of the policy covering articles in storage rooms, vaults, and safes, and 25% of the loss charged against the \$10,000.00 coverage of articles outside of storage rooms, vaults, and safes. (419). This finding is

erroneous for the reasons that all of said customers' fur coats destroyed or damaged in said fire were situated outside of storage rooms, vaults, and safes, and none of the same were situated in a storage room, vault, or safe. Also the said alleged segregation is not supported by substantial evidence, but is based upon pure guesswork, speculation, and conjecture. Appellee admitted that the situation was such after the fire that it was impossible for him or anyone to tell what part of the fur coats destroyed in said fire were situated in the westerly part of the work room and what part thereof were in the easterly part of the work room.

10. In making finding of fact No. 10, which is erroneous and contrary to the record in numerous respects: (a) This action was *not* instituted upon the assigned claims of customers as erroneously stated therein. The complaint makes no allegation as to assignments. Appellee's right of recovery, if any, is completely subject to all of the erroneous acts and omissions of himself and his employees. (b) That the sum of \$27,415.00 referred to therein as the total value of coats destroyed is erroneous, improper, and greatly in excess of the total value of said coats destroyed, and greatly in excess of the total maximum values listed upon customers' receipts. (c) That the sum of \$17,567.62 therein stated is erroneous, improper, and greatly in excess of the total retail value of said replaced coats. (d) That

the sum of \$1,151.01 as the amount customers paid in cash is erroneous, improper, and insufficient. The correct amount paid by customers in cash in connection with replacement of coats destroyed was \$4,712.47. Appellee contended that he had a right to deduct therefrom 20% federal luxury tax in the sum of \$3,561.46, thereby arriving at the said sum of \$1,151.01. However he admitted that he had paid no tax thereon. Obviously these transactions did not constitute a sale, and hence are not legally subject to a sales tax, nor a luxury tax on sales. For the same reasons it follows that the sum of \$16,416.61 is not the correct figure for the net retail or replacement value. (e) This finding is also erroneous in referring to coats sold, as these were replacements and not sales; and hence not taxable as sales.

(f) This finding is also erroneous in deducting only appellee's net profit on replacements, namely 25%, rather than deducting appellee's gross profit on replacements, the same being admittedly 41.78%. In other words, as to these replacements the cost to appellee means the amount he paid at wholesale to purchase the coats. (g) The sum of \$14,973.99 is erroneous, improper, and greatly in excess of the total sum paid by appellee on cash settlements to customers. It is undisputed that the total of the amounts of cash settlements paid by appellee to his customers shown by the written releases signed by them, which are exhibits

herein, is \$14,106.04; or a reduction for that reason of \$867.95. (Pltf. ex. 3; 68). For the foregoing reasons the final amounts stated in the last sentence of said finding, namely, \$27,286.45, as the total cost of settlements, and \$19,086.45 as the unpaid balance thereon, are each erroneous, improper, and grossly excessive under the evidence. (420).

11. In making conclusion of law No. 1 that appellee is entitled to recover judgment in the sum of \$19,086.45 and costs, as the amount of said recovery is grossly excessive, and for the numerous reasons herein stated cannot exceed the sum of \$1800.00, less our costs, the same being the unpaid balance of the maximum liability herein in the sum of \$10,000.00 by reason of the fact that said destroyed fur garments were situated outside of the storage room. (421).

12. The court erred in entering judgment in favor of the plaintiff against the defendant in the sum of \$19,086.45, and costs. (424).

13. The court erred in denying defendant's motion for new trial. (390-397, 415).

14. The court erred in overruling each and all of defendant's objections to plaintiff's proposed findings of fact and conclusions of law. (408-411, 416-422).

15. The court erred in making and entering judgment in favor of the plaintiff against the defendant for any sum in excess of \$1800.00.

16. The court erred in finding and holding that there was any storage room, within the meaning of the insurance policy, on the mezzanine floor of the Barnes-Woodin department store where the fire damage involved herein occurred.

17. The court erred in finding and holding that by reason of said fire any liability of the defendant arose under said insurance policy in excess of the sum of \$10,000.00, by reason of the limitation in the insurance policy limiting said liability to the sum of \$10,000.00 as to any damage occurring outside of storage rooms, vaults, and safes. (49).

18. The court erred in finding and holding that defendant was liable as to any fur garment in excess of the agreed valuation thereof stated on the receipt issued by the plaintiff to the customer pursuant to the provision of the insurance policy involved herein. (48).

19. The court erred in finding and holding that defendant was liable to plaintiff for any fur garments as to which no valuation was stated by the plaintiff on the receipts issued by him to his customers, as required by the insurance policy. (48).

20. The court erred in finding and holding that defendant is liable to plaintiff as to any fur garments in excess of the amount stated on the receipts issued therefor in instances where insurance certificates were also issued as

to said fur garments, and especially in instances where said receipts and certificates were issued at different times and for different amounts. (46-48).

21. The court erred in finding and holding, with reference to fur garments which were replaced by the plaintiff, that the liability of the defendant is in excess of the wholesale cost to plaintiff of purchasing said replaced fur garments. (49).

22. The court erred in finding and holding with reference to said replaced fur garments that the full amount of the gross profits of the plaintiff thereon should not be deducted in determining the amount of defendant's liability to plaintiff with reference thereto. (49).

23. The court erred in finding and holding that in determining the amount of liability as to said replaced fur garments that plaintiff is entitled to credit for any federal or state luxury or sales taxes, there having been no taxable sale thereof.

24. The court erred in finding and holding that plaintiff is entitled to any recovery as to the replaced fur garments by reason of the fact that plaintiff failed to sustain his burden of proof to show with sufficient specific definiteness and certainty the amount of his actual recoverable loss thereon.

ARGUMENT

1. SUMMARY OF ARGUMENT

Our principal contentions herein may be briefly summarized as follows:

1. *The only storage room for customers' fur coats in the entire store was upstairs on the second floor. None of the coats there were damaged in any way by the fire. All of the damaged and destroyed fur coats were situated in the work room on the mezzanine floor. There was no storage room on the mezzanine floor.*

In fact this was not a separate room at all, as there was no wall separating it from the remainder of the store. But even if it were a room, it was only one room, and not two rooms. It was a single work room. The decision of the court dividing it into two separate rooms and holding that 75% of the destroyed fur coats were in one of the rooms and 25% in the other end was clearly erroneous and based on pure speculation and conjecture.

Consequently under the plain terms of the policy there cannot in any event be liability by reason of this fire for more than \$10,000.00, as the loss occurred outside of the storage room. As appellant has already paid \$8200.00, recovery herein cannot exceed the balance of \$1800.00, less appellant's costs in both courts. Prior to the trial appellant, pursuant to Rule 68 of the Federal Rules of Civil Proced-

ure, served upon appellee an offer of judgment in said sum, which was not accepted.

This issue is in our opinion determinative of the entire case in favor of appellant; and in such event none of the other issues need be considered. Moreover this \$10,000.00 maximum limitation applies to the certificates also, as they were issued *expressly subject to the terms and conditions of the master policy*, including the \$10,000.00 maximum limitation.

2. The court erred in its rulings upon admissibility of evidence and in making various findings of fact and conclusions of law and entering the said judgment in favor of the plaintiff, in the respects and for the reasons hereinabove stated.

3. Also under the plain terms of the policy liability as to each coat cannot exceed the valuation, if any, stated on the receipt therefor. Consequently in those instances where appellee issued and the customer accepted receipts stating no valuation whatever, clearly there is no liability of appellant as to those coats. Also in those instances where appellee wrongfully issued certificates and receipts for different amounts, appellant's liability to appellee cannot exceed the valuations stated on the receipts, as the certificates are expressly subject to that condition clearly stated in the master policy. This is especially true where the certificates and receipts were issued at different times,

which was contrary to the requirements of the policy. The amount of recovery herein is grossly excessive and should be greatly reduced.

4. Appellant's liability in any event cannot exceed the amounts stated in the proof of loss filed by appellee nor the amounts of cash settlements paid by appellee to the coat owners.

5. Appellant's liability in any event as to the replaced coats cannot exceed appellee's cost thereof at wholesale, after deducting the entire gross profit which appellee received. Appellee in this respect failed to sustain his burden of proof as to the amount of recovery. The court erred in deducting only appellee's net profit and not his gross profit. The court also erred in permitting appellee to recover from appellant the federal luxury sales taxes, in view of the fact that these were replacements and not sales, and no such tax was paid thereon, and these transactions are not taxable.

2. ALL DAMAGED FUR COATS WERE OUTSIDE OF
STORAGE ROOM—THERE WAS NO STORAGE
ROOM ON MEZZANINE FLOOR—CONSE-
QUENTLY LIABILITY CANNOT EXCEED
\$10,000.00

A. THIS WAS NOT A ROOM

Before considering the principal question in the case

whether this was a storage room, we submit that this was not a room at all. It was not enclosed within four walls. There was no wall partitioning it off from the remainder of the store, especially on the east side. The fur sales room was situated on the open mezzanine floor at the top of the stairway from the street floor, and except for some show cases was not partitioned off in any manner from the remainder of the store. Likewise there was no partition between the sales room and the work room, but only show cases in which new fur coats on sale were kept. There was no door between those two rooms, but only an opening between the rows of show cases covered by a cloth drape. (It is true that there was a flimsy partition on the south side of the work room at the end of the mezzanine floor.) There was, however, no partition or wall of any nature on the east side of the work room separating it from the fur sales room and from the remainder of the main floor of the large department store. (161-2, 252-3, 269).

We submit that under these undisputed circumstances this space referred to as the work room was not even actually a separate room at all, but merely part of the more or less open space of the department store itself.

The following authorities clearly establish: (1) that *this entire space referred to as the work room actually was not a room at all, because not enclosed on all sides by walls and partitions to separate it from the remainder of*

the store; and (2) a fortiori obviously the district court erred in holding that the west end of the work room constituted a storage room or a room at all, as admittedly there was no wall or partition of any nature separating the east and west ends of the work room. (160, 219-20, 272-3).

Webster's New International Dictionary (1933 reference history ed.) defines "room" as follows:

"Space enclosed or set apart by a partition; an apartment or chamber;—often in combination; as a bedroom; bathroom; the stateroom in a ship or railroad car." (All italics are ours).

In 54 C. J. 1102, the word "room" is defined as follows:

"A familiar word, not without some considerable varieties of meaning. It has been defined as a single inclosure, separated by partitions or other means from the other parts of a building; a subdivision of a building, or the building itself where the structure contains but one room; space in a building marked off or set apart by a partition; space which has been set apart or appropriated to any purpose. In its broad sense, any space or apartment separated from others by partitions; and in this sense it would include a mere closet, or any small apartment thus separated. 'Room' may include a rear porch, but it has been held not to include sleeping quarters in a store, screened from the gaze of customers."

Under the rule of *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487, the decisions of the Supreme Court of Washington are of course entitled to controlling effect.

Fidelity & Guarantee Fire Corp. v. Bilquist, (CCA 9) 108 F. (2d) 713, 715.

Featherstone vs. Dessert, 173 Wash. 264, 22 P. (2d) 1050, directly presented the question whether the enlarged space in the hallway near the elevator, in a hotel, admittedly in full view of the hotel patrons, constituted a room. The statute provided that a hotel, in order to exempt itself from its common law liability, must post certain notices in the public rooms thereof. The Washington court en banc held that such space does not constitute a room. The court said:

"The question then remains whether the posting of the notices on the sides of the elevator shaft constitutes a sufficient compliance with the statute. This, in turn, depends upon whether the enlarged space around and about the elevator constitutes 'a room' within the meaning of the act . . .

"In the absence of anything in the context to the contrary, words are to be taken as understood in their ordinary and popular sense . . . A 'room' as defined in Funk & Wagnall's Standard Dictionary.

' . . . is a space for occupancy or use *enclosed on all sides*, as in a building; an apartment; frequently named for the use to which it is put, as, bedroom, dining-room, engine-room, gun-room, tool-room.'

"But it is hardly necessary to resort to lexicography to determine the meaning of the word. It is one of daily use, and has a well defined signification. Whatever it may denote with reference to a building, *it is commonly and popularly applied to something other than*

a mere hallway, passageway or entrance to an elevator. Should one layman say to another, 'I will meet you in the *hall* or *hallway* by the elevator,' neither will misunderstand what is meant. Should he say, 'I will meet you in the *room* by the elevator,' it would probably provoke an inquiry for a more specific designation . . .

"Under the evidence in this case, we must hold that appellants did not post the notices in the public rooms of the hotel, and therefore did not comply with the statute."

Additional authorities on this point are cited in Appendix A hereto.

We therefore submit that this space on the mezzanine floor referred to by all of the witnesses as "the work room" was not actually a room at all, for the reason that it was not partitioned off from the remainder of the store, but was merely separated by a row of show cases between it and the fur sales room, and a passageway covered by a movable cloth drape without any door.

Also very clearly for the foregoing reasons and under the said authorities and others to the same effect, the district court was entirely wrong in holding that the west end of the said work room constituted a separate storage room, as admittedly there was no partition or wall of any nature across the same or between the west and east ends thereof.

B. THIS WAS NOT A STORAGE ROOM

We again quote paragraph 2 of the Furriers-Customers Custody Rider of this policy;

"2. *This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise, nor in any event for more than the cost to repair or replace the article with materials of like kind and quality, provided always that this Company shall not be liable in any one casualty for more than the limit of liability as stated below for the location at which such casualty occurs:*

"Limits of Liability

<i>"In storage rooms,</i>	<i>Outside of storage rooms,</i>	<i>Locations</i>
<i>vaults and safes</i>	<i>vaults and safes</i>	<i>at 301 E. Yakima</i>
<i>\$100,000.00</i>	<i>\$10,000.00</i>	<i>Avenue,</i>
		<i>Yakima, Wash.</i>

nor for more than \$5000.00 while at any other location not used by the Assured for storage, nor for more than \$5000.00 while in transit." (Pltf. Ex. 1; 49).

It is undisputed that there was no vault or safe for the storage of customers' furs or otherwise on the mezzanine floor. Appellee contends, however, and the district court erroneously held that the west end of the work room constituted a storage room within the meaning of the policy, and hence came within the \$100,000.00 rather than the \$10,000.00 limitation. Under the facts shown by the undisputed evidence hereinabove summarized and under the authorities hereinabove cited, this was clearly erroneous.

The summer storage of customers' fur coats in the extremely hot, arid Yakima district requires cooling or refrigeration devices. It is undisputed that there were no refrigeration or air cooling devices whatever on the mezzanine floor, and it was never locked and could not be locked and was at all times open to all of the employees and the general public. *The only storage froom for customers' fur coats in the entire store was situated upstairs on the second floor.* This storage room was at all times kept locked and subject to refrigeration or air-cooling machinery. (165).

It is undisputed that the only fur coats damaged by the fire were situated on the mezzanine floor. None of the fur coats in the storage room on the second floor were in any way damaged. The damaged coats were not situated in any storage room, but were in appellee's work room. (118, 164, 167, 186).

The fur coats were not stored in the work room, but were merely temporarily hung in the westerly portion of the work room for the time being until they could be reached to be worked upon and repaired before placing the same in storage on the second floor. *Admittedly no partition or wall of any kind separated the said westerly and easterly portions of the work room.* (160, 219-20, 272-3). The easterly portion of the room, and in fact most of the room, was occupied by sewing machines and work tables for repairing, fitting, and doing general work upon

customers' fur coats. (251-2, 269-71, 285). The entire room was clearly a work room and not a storage room. (251-8, 273-5, 282-5, 287-8, 291, 311). It was so designated by appellee himself. (118, 120, 124, 159-61, 167, 186, 196-7, 201, 235, 270-1).

As soon as inspection, cleaning, and repair work upon each fur coat was completed, the same was placed in storage in the storage room on the second floor. (121-4, 126, 166-7, 182, 201, 206, 220, 224-5, 228-31, 234-6, 282-3).

Appellee in two places signed the application for this insurance policy hereinabove quoted, which clearly, definitely, and unequivocally stated that there was only one storage room for customers' fur coats in the entire store, and that it was situated on the second floor and not on the mezzanine floor. (Deft. ex. A; 169-171, 187-189).

The reason for an insurance policy of this nature specifying a higher amount of coverage for fur coats in storage rooms, vaults, and safes, and a lower limitation of coverage for coats outside of storage rooms, vaults, and safes, is obvious. The coats situated in storage rooms are within definitely walled and partitioned enclosures, and customarily such storage rooms, vaults, and safes are kept locked, as was true with the storage room on the second floor in this instance. This policy, within its limits and subject to its terms, covers customers' fur coats as against damage by fire, theft, mysterious disappearance, or other-

wise. It is what is referred to as an inland marine insurance policy because of the broad range of risks covered, as in the case of marine insurance (290).

Obviously the danger of fire, theft, mysterious disappearance, or other damage, due to acts, carelessness, or omissions of employees or of the general public, is infinitely greater as to fur coats which are kept out in the open, as in this work room, than would be the case as to fur coats which are stored in storage rooms, vaults, and safes. The greater the number of people, both employees and the general public, who have access to fur coats, manifestly the greater is the danger of damage thereto, due to fire, theft, mysterious disappearance, or otherwise.

This case is a perfect illustration of this obvious fact. None of the fur coats in the storage room on the second floor were in any way damaged. The coats involved herein were damaged by a fire which started at 5:35 p. m., within five minutes after the store closing time. Although the cause of the fire has never been definitely known, it seems quite clear that the same was probably caused by a lighted cigarette carelessly dropped by someone, probably an employee, at the close of the day's work. If the fire had occurred in the middle of the night when no one was present, it would probably have been due to defective electrical wiring of some nature, but this fire occurred right at closing time in the late afternoon. Four employees worked in

the work room. No employee worked in the locked storage room and no cigarette was dropped there. (57, 175-6).

Appellee's admissions to Mr. Sinclair hereinabove quoted clearly established that he knew very well that he had only \$10,000.00 insurance coverage on customers' fur coats damaged in this fire. (254-8, 262-3).

It would be, to say the least, an extremely strange, unnatural, and unreasonable construction of the language of this policy contract to say that this work room, either in its entirety, or the west end thereof, was a storage room. A storage room clearly means a room which, in the first place, is completely enclosed, partitioned, and walled in, and secondly, means a room which is dedicated and used solely and exclusively (or at least in any event, principally and primarily) for the purpose of permanent storage of customers' fur coats. This space, however, was not used for storage purposes at all, and was not even a room. This work room was used not only principally and primarily, but was actually used solely and exclusively as a work room for repairing, inspecting, cleaning, and fitting customers' fur coats. It is true that the coats were hung temporarily in this work room until they could be reached to be worked upon, *but this did not change the nature of the room nor the nature of the west part of the room, but was merely incidental to its use as a work room.* After this work was

completed, each coat was then placed in storage in the storage room on the second floor.

This distinction between "*preparation for storage*" and "*while in storage*" is expressly and definitely pointed out in the policy contract, which provides:

while the property is in the custody or control of the Assured for alteration, repairing, cleaning, remodeling, or *preparation for storage*, or for return to customers; and *while in storage rooms, vaults, or safes* at locations hereinafter described." (Plft. Ex. 1; 47, 48).

Manifestly the intention of the parties by this language in the contract was to draw a definite distinction between "preparation for storage" and "while in storage rooms." While in the work room the coats were merely undergoing preparation for storage. When the preparation for storage was completed, they were placed in storage in the storage room upstairs on the second floor. This is the general custom of the fur business, in contemplation of which this policy was written.

This same distinction is conceded by appellee in paragraph 6 of his complaint and in the findings of fact (No. 6) proposed by him and entered by the court. (5, 418).

Aside from one or two coats which might be kept temporarily for only a few hours in the shipping or receiving room in the basement ("in transit") or at a small place for cleaning fur coats on the second floor, it is undisputed that

the only location in this entire store at 301 East Yakima Avenue, which was ever used for customers' fur coats, was this storage room on the second floor, and this work room on the mezzanine floor. If our contention is not correct—if not only the storage room but also the work room on the mezzanine floor was a storage room—then in Heaven's name why this segregation provision in the contract—why the insertion of this \$10,000.00 limit of liability “outside of storage rooms, vaults, and safes?”

Appellee's brother admitted that this mezzanine space was not used as a storage room in 1943 when he became an employee. (209). Appellee admitted that there was no change in the method of handling the coats in 1942 when the policy was issued, or at any time thereafter. (206). Consequently this could not have been a storage room in 1944 when the fire occurred.

It is undisputed that in insurance of this nature the amount of coverage inside the storage room is always much more than the coverage outside of the storage room. (317).

If, as appellee contends, this work room was a storage room, then *both* of the two rooms used for customers' fur garments were storage rooms, and there was *no* space in the entire store used for customers' fur coats which was *outside* of a storage room.

It is well settled that every provision in a written contract is presumed to have some effect and to have been in-

serted for some reason and purpose.

Authorities supporting this elementary rule that a contract should be so construed as to give effect to every part thereof are cited in appendix B hereto.

Manifestly this \$10,000.00 limitation provision would not have been inserted in the contract if there were no space in the store used for customers' fur garments outside of storage rooms. If, as appellee contends, both of these rooms were storage rooms, then this portion of the contract would be utter nonsense. Certainly this court cannot reach any such conclusion.

It was in a futile attempt to avoid the force of this unanswerable argument that appellee sought to divide the single work room into two rooms by placing a wall or partition across the middle of the room, which no carpenter or anyone else ever placed there prior to the imagination of counsel at the trial. As hereinabove and hereinafter pointed out, the district court fell into grievous error in accepting this argument of appellee.

The construction of the policy contract for which we contend is the only reasonable interpretation. It is well settled that language used in a contract should be given a reasonable interpretation rather than an unreasonable one.

City of Orlando vs. Murphy, (CCA 5) 84 F. (2d) 531,
cert. denied 299 U. S. 580;

Brooks & Co. vs. N. Car. Public Service Co., (CCA 4)
37 F. (2d) 220, cert. den. 281 U. S. 741;

U. S. vs. Miller Inc., (CCA 2) 81 F. (2d) 8.

It is also well settled that, unless a contrary intent appears, "words employed in contracts are assigned their ordinary meaning."

17 C.J.S. 718, sec. 301;

New York Rapid Transit Corp. vs. New York, 303 U. S.
573, 82 L. Ed. 1024;

Day vs. Equitable Life Assur. Soc., (CCA 10) 83 F. (2d)
147, cert. denied 299 U. S. 548;

Wood vs. Employers Liability Assur. Corp., (CCA 6)
41 F. (2d) 573, 73 A.L.R. 79, cert. denied 282 U. S.
894;

S. S. Kresge Co. vs. Sears, (CCA 1) 87 F. (2d) 135, 110
A. L. R. 583, cert. denied 300 U. S. 670.

Manifestly if insurance contracts were not construed in accordance with the foregoing well settled principles and given a fair and reasonable construction, it would be necessary for insurance companies to increase substantially their premium rates, to the detriment of the public.

It is well settled that the term "storage" connotes a permanent keeping or holding of goods to await some future contingency rather than the idea of mere transiency such as the mere temporary holding of the coats in the work room to be worked upon.

60 C. J. 115, in defining the term "storage," states:

“It is said that the underlying idea of the various definitions of the word, as given by lexicographers, is that of *permanently* keeping or holding goods to await some future contingency; and that the term is not properly applied to merchandise on hand for immediate sale and disposition; and hence it may be defined as warehouse service.”

In *Goodyear Tire and Rubber Co. vs. Northern Assur. Co.*, (CCA 2) 92 F. (2d) 70, a large quantity of baled crude rubber had been unloaded from a ship and left on a pier in Brooklyn, N. Y. Prior to further transportation thereof, the same was destroyed by fire. The question arose whether the same was “in storage” so as to be covered within the terms of a certain insurance policy. The court held that it was not in storage and hence was not covered by that policy. It was, however, covered by a different policy, using different language, and providing different coverage. The court held:

“Where rubber was unloaded on docks by seller, ‘delivery order’ given to buyer who inspected and approved it and rubber was then destroyed before it could be shipped to buyer, rubber was ‘awaiting shipment’ within ‘inland transit floater policy’ covering rubber in which buyer was interested while ‘awaiting shipment’ and was not ‘in storage’ within coverage of import policies covering ‘in storage.’” (Syll.)

Judge Swan, speaking for the court, said:

“The defendant contends further that the rubber was excluded from the plaintiff’s inland transit policy because it was within the coverage of the plaintiff’s import policies. *To come within their coverage it had to*

be "*in storage*" in and about New York Harbor. While lying on the pier awaiting shipment to Akron, it was not '*in storage*'; it was on a pier '*awaiting shipment*' and was within the express coverage of the policy sued on."

In *Monument Garage Corp. vs. Levy*, 266 N. Y. 339, 194 N. E. 848, Judge Lehman, speaking for the court, said:

"Subdivision 15 of that section prohibits the use of building or premises for storage of more than five motor vehicles. Concededly no other subdivision could be construed as a prohibition of the use of premises for a parking space. *There is a substantial distinction, clearly cognizable, between the meaning of 'storage' and 'parking.'* One has a certain degree of permanency, while the other connotes transience. The zoning ordinance is in derogation of common-law rights to the use of private property. Its provisions should not be extended by implication. Consequently, *the prohibition of the use of a building or premises for storage of more than five motor vehicles does not include the use of premises as a place for 'parking,' i. e., a place for the 'standing' of a vehicle, 'unattended by a person capable of operating it.'*"

In *Atlantic Refining Co. vs. Van Valkenburg*, 265 Pa. 456, 109 Atl. 208, plaintiff maintained in Philadelphia a number of gasoline and oil "relay or distribution stations" where it kept petroleum products until the same were distributed and sold. The question arose whether these locations constituted "storage houses" within the meaning of a certain tax statute. The court held that they were not storage houses because they were not used exclusively for storage purposes, but were also used, partially at least,

for sales purposes. Judge Moschzisker, speaking for the court, said:

“Here, on the facts at bar, it is quite clear that, no matter what other purpose plaintiff may have in view, it maintains its so-called relay stations ‘for the purpose of vending goods,’ and does in fact there vend certain of its merchandise, as well as the goods of others; and these facts are controlling. In brief, *plaintiff’s stations are not mere storage houses*, but, to a certain extent at least, sales stores.”

So here the work room was certainly used principally for repairing and fitting fur coats; and even if it were used partially or incidentally for storage purposes, which it was not, this would not render the same or any part thereof a storage room.

Additional authorities on this point are cited in appendix C hereto.

This was therefore a work room and not a storage room on the mezzanine floor. Consequently appellant’s total liability by reason of this fire cannot exceed the sum of \$10,000.00.

C. FINDING AS TO PERCENTAGES OF LOCATION OF DESTROYED COATS IS PURELY SPECULATIVE—
PLAINTIFF FAILED TO SUSTAIN HIS BURDEN OF
PROOF AS TO AMOUNT OF RECOVERY

The court clearly erred in making finding 9, that 75% of the customers’ fur garments destroyed in this fire were

situated in the west end of the work room, erroneously denominated by the court a storage room, and that 25% thereof were in the east end. (419). As hereinabove stated, this contention was made by appellee and this finding made by the court because otherwise there was no answer to our contention that if *both* of these rooms were storage rooms, there was no other location in the store used for keeping customers' fur coats, and hence the contract would be absurd and unreasonable in including the \$10,000.00 classification at all, as there could be no possible location in the store to which the same would be applicable.

This finding is clearly erroneous for the additional reason that the same is based upon pure guess-work, speculation, and conjecture. Appellee admittedly was engaged in operating his farm and paying little attention to the fur business. He was not even at the store until after the fire had been extinguished. The evidence clearly establishes that at that time it was physically impossible for anyone to tell with any degree of certainty what percentage of the fur coats which had been burned up and destroyed in the fire were situated in the east end and what part in the west end of the work room. (125, 126, 175, 176, 186, 197, 251, 261, 269, 320).

It is of course well settled that the burden of proof is upon the plaintiff to show with reasonable certainty the definite amount of recovery and all essential facts pertain-

ing or incidental thereto, and that a judgment, not based upon substantial evidence establishing with reasonable certainty the amount of recovery, but based only upon guess-work, speculation, and conjecture, is erroneous and must be set aside.

These rules are elementary, and authorities thereon are cited in Appendix D herein.

This burden of proof the plaintiff-appellee wholly failed to sustain. This finding is wholly unsupported by any substantial evidence, but only by pure guess-work, speculation, and conjecture. It is fundamental that a finding and judgment having such a flimsy basis cannot legally stand.

D. \$10,000.00 LIMITATION ALSO APPLIES TO CERTIFICATES

This \$10,000.00 maximum limitation as to appellant's liability on customers' fur garments outside of the storage room is likewise applicable to the said 13 certificates, at least while the coats were located in this store. These certificates were not separate and independent insurance policies. They were expressly subject to the terms and conditions of the master policy pursuant to which they were issued, chief among which was the foregoing provision that no liability for coats located in this store outside of the storage room could exceed the sum of \$10,000.00.

Each certificate, hereinabove fully quoted, expressly provided that the same was also "This certifies that (name and address of customer) is *insured under the above designated policy*" *subject in all respects to the terms and conditions of said policy.*" (Referring to the said master policy). Also "This no suit or action is maintainable under the policy unless *all terms thereof* are complied with." (Pltf ex. 3; 68).

The "Furriers" Customers Certification Endorsement" attached to this master policy also expressly provides that all certificates issued thereunder shall be "*subject to all terms, conditions, and warranties of the policy and its rider to which this endorsement is attached.*" (Pltf. ex. 1; 47).

In the 1945 Cumulative Supplement of Couch Cyclo-
pedia of Insurance Law, vol. 1, note 3 under sec. 29, it is
stated:

"A certificate issued to an employee which recites that it is subject to the terms and conditions of the policy, does not constitute a complete contract of insurance between such employee and the insurer, rather, the policy and certificate must be construed together in determining liability on the certificate. *Wann v. Mertopolitan L. Ins. Co. - Tex.* - , 41 S.W. (2d) 50, reversing (Tex. Civ. App.) 28 S. W. (2d) 196 . . .

"A certificate issued to an employee which does no more than certify that a contract of life insurance exists in the form of a group policy issued by the insured to the employer is not a contract of life insurance, and to recover upon the contract of insurance, the employee must show that his loss is one defined by and coming within the provisions of the group policy. *Adair v. Gen-*

eral American L. Ins. Co., (Mo. App.) 124 S. W. (2d) 657; *Brown v. Equitable Life Assur. Soc.* (Mo. App.) 143 SW. (2d) 343; *Williams v Sun Life Assur. Co.*, (Mo. App.) 148 S.W. (2d) 112. The group insurance policy, sometimes referred to as the master policy, is ordinarily the real contract of insurance upon which the plaintiff must rely for recovery. *Watts v. Equitable Life Assur. Soc.*,W. Va..... 23 S.E. (2d) 923. The rights of the insured employee and his beneficiary are determined by the provisions of the group policy. *White v. Prudential Ins. Co.* (Mo. App.) 127 S.W. (2d) 98.

“In fact, the policy contract includes the master policy and the individual certificate. *Ozanich v. Metropolitan L. Ins. Co.*, Pa. Super. Ct....., 180 A. 67, rehearing denied in..... Pa. Super Ct....., 180 A. 576. Where the certificate contains no promise to pay, the insured’s rights as to matters concerning payment are governed by the group policy. *Equitable L. Assur. Soc. v. Austin*, 255 Ky. 23, 72 S.W. (2d) 716.”

See additional authorities on this point cited in appendix E.

Consequently since the certificates were issued expressly subject to the terms and conditions of the master policy, and the master policy very distinctly provides that the total maximum liability of appellant by reason of any fire or other loss in the said store outside of a storage room cannot exceed the total sum of \$10,000.00, it necessarily follows that this limitation applies likewise to the certificates, and appellant’s total liability herein cannot exceed \$10,000.00, less the \$8200.00 previously paid.

3. JUDGMENT BASED UPON ERRONEOUS FINDINGS, INFERENCES, AND CONCLUSIONS OF THE DISTRICT COURT MUST BE REVERSED

There is in this case relatively little conflict in the testimony as to the actual facts. There is complete disagreement as to the inferences and conclusions to be drawn from those facts.

It is of course well settled that insofar as there is a conflict in the evidence it is the duty of this court to review the evidence and to set aside the findings and reverse the case if the district court's findings of fact are *clearly erroneous or contrary to the weight of the evidence*. Moreover this court is in no way bound by *erroneous inferences and conclusions of the court below*.

These principles are elementary. Authorities so holding are cited in appendix F hereto.

4. INSURANCE CONTRACT MUST BE GIVEN FULL FORCE AND EFFECT

A. AMBIGUITY RULE IS NOT APPLICABLE

The rule that if an insurance policy is ambiguous, the same is construed most strongly against the company is not applicable here for the simple reason that this policy is not ambiguous. Its terms are plain, clear, unequivocal, lawful, and binding on all parties.

An insurance policy is a contract, and in construing

the same the general rules for construction of contracts apply.

It is also well settled that in the absence of statute or public policy to the contrary—and here there is none—an insurance company has the right to limit its liability and to impose restrictions and conditions thereon, and the same are binding upon all parties to the contract. *It is the duty and obligation of the courts to give full force and effect to the insurance contract made by the parties—not to make a new contract for them and impose upon them a contractual obligation to which they never agreed, as did the district court in this case.*

These principles are elementary, but authorities thereon are cited in appendix G.

B. APPELLEE IS BOUND WHETHER OR NOT HE READ THE POLICY CONTRACT

It is, of course, well settled that an assured is bound by the terms and conditions of his policy contract, and it is wholly immaterial whether or not he ever read the policy or knew its provisions.

Lumber Underwriters v. Rife, 237 U. S. 605, 59 L. Ed. 1140;

Imperial Fire Ins. Co. v. County of Coos, 151 U. S. 452, 462, 38 L. Ed. 231, 235;

Fidelity & Casualty Co. v. Fresno Flume & Irrigation Co., 161 Cal. 466, 119 Pac. 646;

Hayes v. Automobile Ins. Exchange, 126 Wash. 487, 218 Pac. 252, and 129 Wash. 202, 224 Pac. 594;
Fidelity & Guarantee Fire Corp. v. Bilquist, (CCA 9) 108 F. (2d) 713, 715;
Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297;
Moore v. State Ins. Co., 72 Iowa 414, 34 N. W. 183;
National Union Fire Ins. Co. v. Province, 148 Miss. 659, 114 So. 730;
 32 C. J. 1129.

C. KNOWLEDGE OF AGENT IS IMMATERIAL

It is also well settled that knowledge on the part of an agent of the insurance company of a breach or violation of the terms of the policy or other relevant facts, which as in this case, is not communicated to the insurance company (309) is wholly immaterial, and is not even admissible in evidence against the company.

Fidelity Union Fire Ins. Co. v. Kelleher, (CCA 9) 13 F. (2d) 745;
Boston Ins. Co. v. Hudson, (CCA 9) 11 F. (2d) 962;
Lumber Underwriters v. Rife, 237 U. S. 605, 59 L. Ed. 1140.

If the court agrees with our contentions thus far in this brief, it is unnecessary to decide any of the other questions hereinafter discussed.

5. ERRORS IN ADMITTING APPELLEE'S EVIDENCE

The district court committed numerous prejudicial errors in admitting appellee's evidence over our objections. This erroneous evidence was not later disregarded, but was

partially at least the basis for the court's decision. (329-333).

For example, the court clearly erred in admitting in evidence pltf. ex. 8, the same being a small notebook containing a purported list of various insurance policies alleged to have been written and delivered to appellee by Mr. Orkney, appellant's local agent, the amount of this policy having been therein erroneously referred to as \$100,000.00. (131). This was of course the correct amount of the coverage as to coats in a certain location, namely, in the storage room at this store. Manifestly this was wholly immaterial and certainly had no legal effect in changing the terms of the contract between the parties. No local agent has any such authority, and no one ever intended that this document would have any such effect. This is clearly as inadmissible as would be testimony that Mr. Orkney, after the issuance of the policy, told appellee that he had \$200,000.00 insurance on these coats. Clearly such a statement would not bind appellant nor alter the contract between the parties. *This is especially true in view of the non-waiver provision in the policy hereinabove quoted, expressly showing that no agent had any such authority.*

The court also erred in admitting pltf. ex. 6, appellee's mimeographed advertising circular, and ex. 7, his newspaper advertisement after the fire. (127, 128). These were clearly purely self-serving declarations of appellee, in-

competent, immaterial, and not binding upon appellant in any way.

Pltf. ex. 4, a purported assignment from another insurance company to appellee relative to the McGilvery coat was not properly admitted, no payment was made thereon by appellee, there was no proof of execution thereof, the same was not included within the documents as to which signatures were admitted, and the same was without consideration. In the absence of an assignment duly executed by McGilvery and duly proved, the same was purely self-serving. (98 and see p. 81 et seq. of typewritten record).

The court also erred in admitting pltf. ex. A-1 at the subsequent hearing, the same being a notebook containing various figures, which was not properly identified, not kept in the ordinary course of business, and wholly self-serving, incompetent, and immaterial. (388).

The district court seemed to feel that some of these exhibits tended to show appellee's good faith. *But appellee cannot recover upon good faith. If he recovers at all, he must recover upon the contract. He cannot lift himself by his own bootstraps.*

Appellee's advertising was, however, wholly unreliable. He admitted he advertised that he had insurance protection against moths. Actually he had none, that being excluded under the policy. (Pltf. ex. 1; 48, 177-8).

This was also a clear violation of the parol evidence rule, which is a rule of *substantive* law that the rights of the parties are to be determined entirely by their written contract. 32 C.J.S. 784, sec. 851.

Authorities establishing the inadmissability of these exhibits are cited in Appendix H.

6. LIABILITY AS TO EACH COAT CANNOT EXCEED VALUATION, IF ANY, STATED ON THE RECEIPT THEREFOR

No rights of any customer or coat owner are involved herein. Aside from the additional defendants, who were paid by other insurance companies and have defaulted, appellee has made settlements with all of them. This controversy is solely between Kirkevold and appellant.

The policy provides:

"This policy only covers Furs . . . for which the Assured issues a receipt under which the Assured agrees to effect insurance on the property . . .

"2. This Company shall not be liable hereunder for more than the amount stipulated in the Assured's receipt as applying to each respective article, whether on account of the Assured's legal liability or otherwise." (Pltf. ex. 1; 47, 48).

In the pre-trial order it was agreed by both parties and ordered by the court:

"That no claim will be higher than the valuation set

forth on the receipt issued to coat owners, except in the case of those coats upon which there was a separate policy with the company.' (38).

The issue as to the latter was reserved for decision by the courts. In numerous instances appellee and his employees violated these plain terms of the policy contract and issued and delivered to customers, who accepted, receipts which omitted to state any valuation of the coat. (Pltf. ex. 3; 68).

For a list of the names of the coat owners in this category see appendix I.

As to these garments we submit that very clearly there is no liability of appellant. Under the plain terms of the contract it was necessary for appellee to state the agreed valuation of the garment in the receipt or else there could be no recovery as to that coat.

Manifestly the customer would have no greater rights than specified in the contract. However, as above stated, here no coat owner is bringing suit, but only appellee, who was himself or through his employees guilty of the wrong in violating the terms and conditions of the policy.

In any event, of course the liability as to any of these coats could not exceed \$200.00 at the most, that being the amount stated on the receipt in all instances where any amount was stated, in the absence of a request by the coat

owner for a larger valuation and the payment by her of an additional charge. (73, 74, 77).

It is undisputed that appellant and its agents had no knowledge whatever of these omissions and mistakes of appellee. (138, 142, 183-5, 305-6, 319-20, 322). The receipts were at all times retained in appellee's possession, except for the copy delivered to the coat owner. (183).

Under the numerous authorities hereinabove cited, appellee is bound by the terms and conditions of his contract, and very clearly if no valuation was stated in the receipt, appellant is not liable and appellee cannot recover as to said garments. This is especially true in view of appellee's admission in the pre-trial order. (38).

A similar situation exists as to the 13 damaged coat owners who held certificates. (137). In most of these instances appellee and his employees wrongfully and in violation of the terms of the contract issued certificates and receipts for different amounts. (142, 147, 237).

Appellee admitted that prior to the fire he knew that valuations were omitted on numerous receipts and that the amounts varied on receipts and certificates as to the same coats. (137-8). He also knew that appellant's liability was limited to the valuations stated on the receipts. (148-9). Nevertheless admittedly he did nothing to rectify the situation.

As hereinabove pointed out, the certificates were expressly subject to the terms and conditions of the master policy, including the requirement that appellant's liability should not exceed the valuation stated on the receipt.

Such agreements as to limitation of the amount of liability in the event of loss or destruction of bailed chattels are frequent and customary; and the legal validity of such agreements has been at all times recognized. 8 C.J.S. 264, sec. 26c.

Appellee also violated the terms of the policy in issuing certificates and receipts to the same coat owners at different times, as well as for different amounts. (142, 147, 237).

The "furriers' customers certification endorsement" which is part of this policy provides:

"It is agreed by the Assured that Certifications of Insurance *shall be issued only in combination with annual storage agreements at a combined storage and insurance rate.*" (Pltf. ex. 1; 46).

Clearly the words "*in combination with*" mean that the certificates and receipts as to each garment should be issued at the same time.

Authorities so holding are cited in appendix J hereto.

All of these certificates were issued by appellee (in appellants' name). Appellee had no authority whatever to issue certificates except in accordance with the terms and conditions of the master policy. (141-2, 195-6). These were

admittedly mistakes made by appellee and his employees (142, 147, 237). For these mistakes appellee is responsible, but not appellant. Appellant had no knowledge whatever thereof. Copies of the receipts were never sent to nor seen by appellant or any of its agents. It was at all times contemplated that the receipts should be in the possession of only appellee and the coat owners. (138, 142, 183-5, 305-6, 319-20, 322).

Manifestly appellee cannot by his own wrongful acts, without the knowledge or consent of appellant, increase appellant's liability above the agreed valuation of the property stated on the receipt, irrespective of the issuance by appellee of certificates for larger amounts.

If no agreed valuation was stated on the receipt, as to such coats there can be no liability under the terms of the contract. And under the contract appellant's liability cannot exceed the valuation stated on the receipt as to any coat, even though appellee wrongfully issued a certificate thereon for a larger amount.

The additional premium paid by certificate holders merely entitled them to coverage of the fur coat at any location, whether within or outside of this store. The same was not independent insurance, but must comply with the terms and conditions of the master policy.

In this connection see the discussion and authorities

hereinabove cited under headings 2.D and 4.

Overruling our objections to the contrary that the same would materially assist this court in the determination of this appeal, the trial court and counsel for appellee erroneously refused to include in the findings an itemized list of the amounts recoverable as to each coat. This is shown, however, by a former draft of proposed findings prepared by counsel for appellee. (402).

For the numerous reasons herein referred to, the statement in findings No. 6 and 10 that the total value of customers' coats destroyed was \$27,415.00 is erroneous, contrary to the evidence, and grossly excessive. Also said sum is greatly in excess of the total amount of the valuation stated on the receipts, as well as the amounts stated in appellee's proof of loss and the releases signed by customers. (Pltf. ex. 2,3; 58-68.

As to the Belaire coat, for example, appellee cannot recover more than \$200.00, the amount claimed in the proof of loss therefor (Pltf. ex. 2: 62). The amount of her certificate was \$325.00. (Pltf. ex. 3; 68). Appellee's counsel at the argument conceded that recovery thereon could not exceed \$325.00. (342, 343). However, over our objection the court allowed recovery of \$350.00 thereon, which was clearly erroneous. Also as to the Southard coat appellee admitted his recovery could not exceed \$200.00, but actually he recovered \$250.00. (155,406).

This action was *not* instituted upon the assigned claims of customers, as erroneously stated in Finding 10. The complaint (3-7) makes no allegation as to assignments. Appellee's right of recovery, if any, is completely subject to all of the erroneous acts and omissions of himself and his employees hereinabove mentioned.

Appellee clearly cannot recover as to any coat an amount in excess of the agreed valuation thereof stated on the receipt, nor in excess of the actual value claimed therefor in appellee's proof of loss, nor in excess of the amount of the certificate, if any, on such coat, nor in excess of the cash settlement, if any, actually paid by appellee on said coat.

Consequently we have for the convenience of the court set forth in appendix N. hereto a list showing the maximum amount recoverable as to each coat and the basis therefor. The total is \$20,531.04, of which \$8200.00 has been paid. The court will bear in mind that this list is of course subject to the total \$10,000.00 maximum limitation as hereinabove stated, and also subject to reduction for the cost of replacement hereinafter discussed.

7. LIABILITY CANNOT EXCEED AMOUNTS STATED
IN APPELLEE'S PROOF OF LOSS NOR
AMOUNTS PAID

Appellee conceded that of course he is not entitled to

and is not asking recovery in excess of the amounts paid by him on settlements to coat owners. (135, 136).

It is also well settled that appellee cannot recover herein amounts in excess of those claimed by him as the true values in his sworn proof of loss. (Pltf. ex. 2; 58-66).

McLane v. American Mutual Fire Ins. Co., 122 Iowa 355, 98 N.W. 146;

Case v Manufacturers' Fire & Marine Ins. Co., 82 Cal. 263, 21 Pac. 843;

Morley v. Liverpool Lnt. Ins. Co., 85 Mich. 210, 48 N.W. 502;

Banking Savings Life Ins. Co., v. Milan, Tex. Civ. app., 70 S.W. (2d) 294;

National Union Fire Ins. Co. v Provine, 148 Miss. 659, 114 So. 730.

8. LIABILITY ON REPLACED COATS CANNOT EXCEED APPELLEE'S WHOLESALE COST

A. APPELLEE FAILED TO SUSTAIN HIS BURDEN OF PROOF AS TO AMOUNT OF RECOVERY

As to the replaced coats appellee cannot recover at all for lack of evidence. As hereinabove pointed out, under the authorities cited in subdivision 2 C hereof, the burden of proof rests upon plaintiff under the evidence both to bring himself within the terms of the contract and also to show definitely the amount of recovery to which he is entitled thereunder. Here again appellee wholly failed to

sustain his burden of proof. He failed to introduce specific evidence complying with this replacement limitation clause of the policy.

B. INSURANCE IS SOLELY FOR INDEMNITY, NOT FOR PROFIT

In any event, the amount of recovery herein is grossly excessive. Under the policy appellant's liability cannot exceed appellee's wholesale replacement cost. It is well settled that the whole underlying basis of insurance is solely for indemnity and not for profit. Notwithstanding this, appellee is here admittedly seeking to recover a profit at appellant's expense. (184-5, 256-7). This may not be done.

Authorities supporting this elementary principle are cited in appendix K hereto.

C. APPELLEE'S GROSS PROFIT, RATHER THAN NET PROFIT, SHOULD BE DEDUCTED

The policy contract provides:

"This company shall not be liable hereunder . . . in any event for more than the cost to repair or replace the article with materials of like kind and quality."
(Pltf. ex. 1; 49).

It is undisputed that appellee's gross profit was 41.78%; his wholesale cost was 58.22% of the retail value. (172, 356, 359, 371, 376). His rate of net profit was 25%. (377, 379). The court erred in permitting a deduction of only the net profit, as the entire gross profit should be deducted

to arrive at appellee's wholesale cost, which is clearly what was contemplated by this provision of the policy. As to these replacements the cost to appellee means the amount he paid at wholesale to purchase the coats.

In *Cooley's Briefs on Insurance* (2d ed.) vol. 6, P. 5095, it is said:

"And where it is provided that the insurer's liability shall in no event exceed what it would cost the insured to repair or replace the property destroyed, the clause (limiting the insurer's liability to the cost to repair or replace) means, in the case of personal property, not the market value of the property, but *what it would actually cost to repair or replace the destroyed property.*"

Additional authorities to the same effect are cited in appendix L.

D. REPLACEMENTS ARE NOT TAXABLE AS SALES

The court also erred in Finding 10 and elsewhere in charging appellant with taxes. Appellee received \$4,712.47 cash from customers in connection with coat replacements. (Additional payments to obtain better coats). (382). The court erroneously permitted appellee to deduct therefrom 20% federal luxury tax on the full retail value of all replacements in the sum of \$3561.46, the difference being only \$1151.01. (382). Appellee conceded, however, that he paid no tax thereon. (367, 370, 371). Manifestly these replacement transactions did not constitute sales, and hence

are not legally subject to a sales tax nor a luxury tax on sales. The court clearly erred in charging appellant therewith. Appellant is entitled to credit for the full amount of all cash payments by customers, without any tax deduction therefrom.

Clearly where there is no sale, there is no tax. The statute (26 USCA sec. 2401) provides:

“There is hereby imposed upon the following articles sold at retail a tax equivalent to 20 per centum of the price for which so sold: Articles made of fur on the hide or pelt, and articles of which such fur is the component material of chief value.”

The essential ingredient of every sale is the payment of the purchase price equivalent to the value of the article by the purchaser to the seller. Here there was no payment of any purchase price. There was merely the delivery of an article in replacement of another destroyed. There was no sale, and hence no sales tax.

Authorities supporting this well settled principle are cited in appendix M hereto.

E. FINDINGS THEREON ARE ERRONEOUS

For the foregoing numerous reasons finding 10 (420) is clearly erroneous and should be set aside.

The maximum liability on this phase of the matter is as follows:

From the retail price of the coat replacements, \$17,567.62, should be deducted appellee's gross profit of 41.78%, which leaves \$10,227.87, appellee's wholesale cost of the coats delivered in settlements. Deducting therefrom customers' cash payments, \$4,712.47, which is included in the said \$17,567.62, leaves \$5515.40. The latter figure represents the maximum amount of possible recovery herein as to replaced coats.

The total cash settlements paid by appellee shown by the, written releases is \$14,106.04. (Pltf. ex. 3; 68). The total of these two figures is \$19,621.44. Appellee's recovery *could not in any event exceed the latter figure*, less the \$8200.00 heretofore paid, or \$11,421.44. (But see the next paragraph.)

9. CONCLUSION

We particularly call the court's attention to the last appendix, appendix N hereto. Subject to the \$10,000.00 limitation, the second column thereof gives the total maximum liability, namely, \$20,531.04, less \$8200.00 paid, without considering replacements. The final column, however, makes allowance for replacements at the rate of 58.22%, the wholesale cost to appellee. The figures in both columns are the same as to cash settlements. The total figure in the final column is \$17,403.02, less \$8200.00 paid, or \$9,203.02, which is the total maximum liability of appellant

herein, aside from the \$10,000.00 limitation.

However, our contention as to the \$10,000.00 limitation is sound, and we therefore submit that the judgment should be reversed with directions to enter judgment in the sum of \$1800.00, less appellant's costs in both courts.

Respectfully submitted,
CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
JOHN GAVIN
WALTER J. ROBINSON, JR.
Attorneys for Appellant

APPENDIX

ADDITIONAL AUTHORITIES

A. *Additional Authorities Referred to on Page 45.*

In *Strell vs. Zisman*, 5 N. J. Misc. 427, 136 Atl. 801, the court held that the screened-off portion of a store used by the owner for sleeping quarters, did not constitute a room.

The court said:

"The upholsterer, for his own convenience, had screened off part of the rear of the store for sleeping quarters for himself and his two sons. It was a makeshift affair and was described by witnesses as an improvised room or platform extending from the rear wall into the store, resting on two by four joists and inclosed with beaver boards to the height of six feet above the platform. This 'room,' it is claimed violated the Tenement House Act and rendered complainant's title defective and invalid, and justified the defendant's rejection of the contract. The contention is untenable

"But if it be granted that the building was within the statutory definition of a tenement house, there was no violation of the section secondly above quoted. The sleeping quarters, screened from the gaze of customers in the store, did not rise to the dignity of a room. It was a mere insert in the store, a bunk, a poor man's substitute for a folding bed, and so frail that it could be taken apart in an hour. *It was not a structural change of the building* or division of the store into two rooms, and interdicted by section 28, unless the change conformed to other provisions of the act as to windows, light, and air."

Bearing in mind the rule of *Erie Railroad Co. vs. Tompkins*, supra, what is the law in New York? That is the state in which appellant is incorporated and has its principal

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home office for the issuance of policies. In *Gardner vs. Roosevelt Hotel*, 24 N. Y. S. (2d) 261, the New York court approved the foregoing authorities, and also *Michaels vs. Fidelity & Casualty Co.*, 128 Mo. App. 18, 105 S. W. 783, *infra*. There, as here, the plaintiff checked her fur coat on the mezzanine floor and it was never returned. The checking facilities consisted of racks and tables placed in an enlarged open space in front of the elevator. The statute limited the liability of the hotel as to property deposited in a check room. The court held that this was not a room. The court said:

“A room is defined in Funk & Wagnall’s Standard Dictionary as ‘a space for occupancy or use *enclosed on all sides* as in a building; an apartment; frequently named for the use to which it is put, as bed room, engine room, tool room.’

“The reported cases in this jurisdiction offer little help with respect to the interpretation to be placed upon the word ‘check room.’ In *Michaels vs. Fidelity & Casualty Co. of New York*, reported in 128 Mo. App. 18, 105 S. W. 783, 784, the court stated: ‘The storeroom is a room in an apartment or flat house set apart and having conveniences such as shelves, hooks, etc., for storage purposes, and is not, for instance, a bedroom used by the tenant in part for storing his goods.’

“Again in *Strell v. Zisman*, 136 A. 801, 802, 5 N. J. Misc. 427, the question arose as to whether the screened-off portion of a store used by the owner for sleeping quarters constituted a room. The court said: ‘The sleeping quarters, screened from the gaze of customers in the store, did not rise to the dignity of a room. It was a mere insert in the store.’

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"In *Featherstone v. Dessert*, 173 Wash. 264, 22 P. (2d) 1050, 1052, an almost analogous situation presented itself. The court in construing a statute similar to Sec. 200 of the General Business Law stated, 'But it is hardly necessary to resort to lexicography to determine the meaning of the word [Room]. It is one of daily use and has a well-defined signification. Whatever it may denote with reference to a building, it is commonly and popularly applied to something other than a mere hallway, passageway, or entrance to an elevator.'

"The court is of the opinion that the legislature in the use of the words 'check room' intended those words in their popular sense, because if it had not so intended it might have readily included and added, 'or other checking space.'

"The court held as a matter of law that the checking facilities provided by the defendants did not constitute a check room within the meaning of the statute."

In *Bentley vs. Taylor*, 81 Iowa 306, 47 N.W. 58, involving a lease using the word "room", in construing that word, the court said:

"The definitions cited show that *the word 'room' has definite meaning such as 'space in a building marked off or set aside by a partition.'* . . . Webst. Dict."

Also directly pertinent is the law of California, the state in which appellant's Pacific coast regional office is situated. In *People vs. Chase*, 117 Cal. App. 775, 1 P (2d) 60, the court said:

"The word 'room' is defined to mean '*space enclosed or set apart by a partition; an apartment or chamber.*' Webst. Dict."

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In *Edwards vs. City of Los Angeles*, 48 Cal. App. (2d) 62, 119 P. (2d) 370, the court defined the word "room" as follows:

"A room is an area set apart or appropriated for any purpose, *marked off by a partition* or line indicating its extent."

In *Crosley vs. City Council* (Ala.) 18 So. 723, 726, the court said:

"In its broad definition, a 'room' is a space or apartment *separated from others by partitions.*"

In *State vs. Barge*, 82 Minn. 256, 84 N. W. 911, 53 L. R. A. 428, the court held that the word "room" in an ordinance was:

B. *Additional Authorities Referred to on Page 9.*

"Used therein in its ordinary sense, as meaning *a single enclosure separated by partitions* or other means from the other parts of the building."

In *Aetna Ins. Co. v. Sacramento-Stockton S. S. Co.* (CCA 9) 273 Fed. 55, Judge Gilbert speaking for this court said:

"It is well settled that all parts of an insurance policy must, if possible, be harmonized and given effect. Unless the rider is irreconcilable with the printed clause, such clause must stand. *Merchants' Insurance Co. v Allen*, 121 U. S. 69, 7 Sup. Ct. 821, 30 L. Ed. 858."

In *Lowery v. Connecticut Fire Ins. Co.* (CCA 2) 70 Fed. (2d) 324, cert. denied, 293 U. S. 576, 79 L. Ed. 674, the court said:

"This clause would be wholly futile unless it was intended to confine legal liability coverage to the named corporations. By so confining it and by limiting the words " 'for whom it may concern' " to cargo coverage, both clauses are given a legitimate purpose and meaning. To extend the " 'for whom' " clause so as to include Lowery as well as the Hedger corporation in effect leaves out of the policy clause 36. All the terms of a contract must, if possible, be harmonized and given effect. *Aetna Insurance Co. vs. Sacramento-Stockton S. S. Co.*, 273 F. 55, 58 (CCA 9)."

In *Rooks and Co. v. N. Car. Public Service Co.*, (CCA 4) 37 F. (2d) 220, 223, cert. denied, 281 U. S. 741, 74 L. Ed. 1154, Judge Parker speaking for the court said:

"It is not reasonable to suppose that such absurd consequences were intended; and it is elementary that, if possible, a construction of one of the provisions of an instrument is to be avoided which nullifies other provisions or leads to absurd consequences. The whole instrument must be construed together and given a reasonable construction, under which if possible, all of its provisions may stand."

In *Norwich Union Indemnity Co. v. Kobacker*, (CCA 6) 31 F. (2d) 411, 414, cert. denied, 280 U. S. 558, 74 L. Ed. 613, in reversing judgment for plaintiff in an insurance case the court said:

"We are concerned here with a written contract. Obviously " 'two' " was inserted therein for some purpose, and would have direct relation to the issuance of a policy (acceptability of the risk) and to the hazard to be incurred by the insurer. It is the duty of the court to give effect to all parts of a written contract, if this can be done consistently with the expressed

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intent of the parties. This can be done here only by construing the instant answer as an agreement on the part of the insured, as a party to the contract, to maintain two watchmen at all times while the policy is in force, and as imposing substantial performance of such agreement as a condition precedent to liability attaching."

In *Curacao Trading Co. v. Federal Ins. Co.*, 50 Fed. Supp. 441, 444, affirmed, (CCA 2) 137 Fed. (2d) 911, cert. denied, 321 U. S. 765, 88 L. Ed. 1061, in dismissing an action to recover upon an insurance policy, the court said:

"The case, therefore, comes down to this: 'Non-delivery' in the policy is a word of art or it is not. As a word of art, it does not include the plaintiff's claim but makes the contract coherent and intelligible. If it is not, its ordinary meaning will contradict the clauses providing that loss shall be paid only on proof of interest in the property insured and the language of the certificate that the defendant 'do make insurance and cause to be insured on merchandise.' The rule is that 'the court will, if possible, give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable.' Williston on Contracts, § 619; Restatement of the law, Contracts § 236 (a); *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 36 S. Ct. 662, 60 L. Ed. 1058; *Fleischman v. Fugerson*, 223 N. Y. 235, 119, N. E. 400."

See also to the same effect:

Woods v. Employers Liab. Assur. Corp., (CCA 7) 41 Fed. (2d) 573, 73 A. L. R. 79, 83, cert. denied, 282 U. S. 894, 75 L. Ed. 788;

Miller v. Penn. Mutual Life Ins. Co., 189 Wash. 269, 64

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Hollingsworth v. Robe Lumber Co., 182 Wash. 74, 45 P. (2d) 614;

Cooley's Briefs on Insurance (2d) 999;

Restatement of Contracts, A. L. I. §236;

Williston on Contracts, Revised Ed., p. 1781, §619;
17 C.J.S., 711 §297, and footnote 86 of page 713;

Andrew Jergen Co. v. Woodbury, Inc., 273 Fed. 952, 959, affirmed, (CCA 3) 279 Fed. 1016, cert. denied, 260 U. S. 728, 67 L. Ed. 484.

C. *Additional Authorities Referred to on Page 57.*

In *Michaels vs. Fidelity and Casualty Co.*, 128 Mo. App. 18, 105 S. W. 783, a certain room in the basement of "a flat house" in St. Louis was kept locked and was used for the safe keeping of vegetables, other articles of food, trunks packed with winter clothes, and certain unused window curtains, as well as for laundry purposes. The wearing apparel and household goods were stolen from this room, and the question arose whether the same constituted a "store room" within the meaning of a certain burglary insurance policy. The court held that this did not constitute a store room. The court said:

"The storeroom contemplated by clause C, we think, is a room in an apartment or flat house set apart and having conveniences such as shelves, hooks, etc., for storage purposes, and is not, for instance, a bedroom used by the tenant in part for storing his goods; nor is it a laundry used as was the one in question. If the

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clause included a bedroom or laundry room in which goods are stored, then the use of any room in the apartment or flat by the tenant to store his and his family's unused apparel, although the room is used for other purposes, if it had a lock door with a key, comes within the definition of storeroom, as the term is used in clause C, and plaintiff could have only secured the protection for which he paid the premium by inducing his landlord to remove the locks from the doors of all the rooms in his apartment in which he kept trunks, or stored unused apparel and household goods."

The *Michaels* case was quoted with approval in *Gardner vs. Roosevelt Hotel*, 24 N. Y. S. (2d) 261, *supra*.

In *Town of Newberry vs. Dorrah*, 105 S. C. 28, 89 S. E. 402, the court held that temporarily placing certain liquor in the cook room in the house of the defendant's employer did not constitute storage thereof. The court said:

"There is not the slightest suggestion in the evidence that it was intended to be stored there longer than dinner time when the defendant intended to go to his own house and carry his liquor with him. . . . It was no more than if he had placed it in a wagon, buggy, or automobile and stopped to finish his work at his employer's house until dinner hour, when he would quit for dinner and carry it home. It was no more storing in the eyes of the law than if one goes to the express office, gets his liquor, lives some distance from town, stops at a store to purchase goods, leaves his package there with intent to return and get it and carry it home, and goes out to attend to business elsewhere, his bank or lawyers, etc. Even if he did open it and take a drink, it was not a violation of law, and not sufficient to establish the fact of storing. *There is quite a difference in storing an article and temporarily*

placing it in a place. To allow a conviction to stand under the evidence in this case would be to strain the law and violate the spirit of it. . . . He temporarily placed it in the cookroom of his employer, and by so doing in no manner violated the intention of the law in such cause made and provided. . . . The defendant has not even technically violated the ordinance under which he is charged. Mr. Justice Jones in *Easley v. Pegg*, 63 S. C. 103, 41 S. E. 18, defines what the terms 'storing' and 'keeping' in possession means, and the evidence in this case does not bring it within the terms of this definition."

In *Easley vs. Pegg*, 63 S. C. 103, 41 S. E. 18, *supra*, the court said:

"The offense of storing and keeping in possession contraband liquors *involves the idea of continuity or habit.*"

In *Williams vs. Grier*, 196 Ga. 327, 26 S. 2(d) 698, 703, the court said:

"The second of these ordinances provided that no person or garage or sales place should be allowed to use the streets of the city for storing cars, either by day or night. While the petition alleged in several places that the truck was 'parked and stored,' these terms are not interchangeable, but as ordinarily used have different and inconsistent meanings. The term 'parking,' as applied to automobiles is generally understood to mean the act of permitting such vehicles to remain standing on a public highway or street when not in use, but *it also implies transience, while the term 'storing' connotes a certain degree of permanency.* 31 Words & phrases, Perm. Ed. pp. 96-97 1943 Cumulative Pocket Par p. 23; 40 Words and Phrases, Perm. Ed. 226,227. Mere parking would not amount to storing; and this is true even though the vehicle may have been allowed to remain in the same place overnight

and during a portion of the following day Nor would a different conclusion be authorized because of the allegation that the said 'defendants had habitually, for several months prior to said collision, been parking and storing said bakery motor-truck in said place on Green Street carelessly and negligently in violation of said city ordinance of the City of Swainsboro, Georgia, as aforesaid.' This averment, when construed by the same rule, does not show that the truck was left to remain continuously in the same place for 'several months,' but its evident meaning is that the defendants had repeatedly and from time to time, by separate acts, parked the truck in said place. Even this did not show storage. It follows that the petition did not state a cause of action so far as it was based on violation of these two ordinances."

Tres Ritos Ranch Co. vc. Abbott, 44 N. M. 556, 105 P. (2d) 1070, 130 A.L.R. 963, involved the question whether certain cattle imported from Mexico into New Mexico, where they were placed in a pasture on a large ranch, which complied with the U. S. Treasury Regulation for bonded warehouses, were "stored" within the meaning of a certain tax statute. The court held that the cattle were not stored, saying:

"It is entirely illogical to contend that cattle can usually be 'stored' like ordinary commodities. *Storage connotes a certain degree of permanency and immobility*, but grazing, or similar terms that are in use to denote the manner of harboring cattle, connote transience."

In *Re Roberto*, 167 N. Y. S. 397, 180 App. Div. 143, involved a large retail coal business at a plant covering practically a city block in Brooklyn, N. Y. The plant consisted of

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three buildings or pockets containing 28 compartments for different kinds of coal, the total capacity being 12,000 tons. Coal was accumulated during the summer for the winter supply. The court held that the employer was not engaged in the business of storage of coal, that term being used in the Workmen's Compensation Law. The court said:

"I am unable to see how this award can be sustained, unless we are prepared to hold that every merchant and country storekeeper in carrying his ordinary supply and stock of goods is engaged in the storage business. The farmer who deposits his grain in the barn until such time as in the natural and ordinary course of events he would market the same; the merchant who purchases the grain from the farmer, and temporarily deposits the same in some convenient place until opportunity presents itself to sell the same to a customer in the ordinary and natural routine of business; the miller who receives the grain and the merchant and keeps it in his mill for a day or two until the natural exigencies of his business permit him to grind it into flour; the manufacturer who buys a commodity and has it in his factory with a view to using it or transforming it into the manufactured product—are all engaged in the storage business within the meaning of group 29, if the employer in this case was so engaged. It is true that the employer was conducting a large and extensive business, but it is not the size or magnitude of the business which is controlling, but the manner in which it is conducted

"Definitions are sometimes vague and unsatisfactory, and the definitions of the term 'storage,' as given by lexicographers, are not conclusive in discovering the legislative intent, but may be helpful in doing so. I think *the underlying idea of those various definitions is that of permanently keeping or holding goods to await*

some future contingency, and that the term is not properly applied to merchandise which a merchant has on hand for immediate sale and disposition."

In the companion case of *Kronberger vs. Harlem Bottle Co.*, 167 N.Y.S. 400, 181 App. Div. 900, the employer maintained a warehouse to which were taken bottles obtained by its employees from the junk and refuse at the city dump. The bottles were washed, cleaned, sorted, and kept at the warehouse until sold. The court held that the company was *not* engaged in the storage of the bottles, on the authority of the *Roberto* case, *supra*.

In *Killian vs. Brith Sholom Congregation*, (Mo.), 154 S. W. (2d) 387, in determining whether the use of premises as a place in which monuments could be kept for sale was a "storage yard" within the prohibition of a zoning ordinance, the court stated that the underlying idea of the word "storage" is that of "holding or safekeeping goods in a warehouse or other depository to await the happening of some future event or contingency which will call for the removal of the goods. As commonly used, the term is not to be applied to goods or merchandise on hand for immediate sale or disposition, as in the case of the monuments which Berger keeps on his premises for sale and not for storage, and which he sells, as does any other retail merchant, whenever a purchaser may be found.'

In *Smith vs. O'Brien*, 94 N. Y. S. 673, involving the question whether a garage had a storage lien upon an auto-

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mobile, the court said:

"This automobile was not stored within the meaning of the lien law, being continuously or occasionally upon the road at its owner's pleasure."

29 *Am. Jur.* 546, sec. 704, discussing the provisions of certain insurance policies, states as follows:

"Provisions of insurance policies that certain articles shall not be 'stored or kept' are generally considered to import the idea of warehousing or depositing for safekeeping, and are usually held not to be violated by reason of the presence of a small quantity such as is usually found on premises such as those insured, or *by the mere temporary presence of the designated articles*. Accordingly, such a provision has been held not to be violated by having a small quantity of the article on hand as a medicine for personal use, and the use of a small quantity of gasoline in a stove for cooking purposes has been held not to be within a prohibition against the keeping or storing of gasoline in the insured building. Likewise, a policy of fire insurance prohibiting the storing of hazardous articles in the premises does not prohibit keeping them for sale therein. A condition against keeping gunpowder for sale or on storage upon the premises insured does not cover the case where gunpowder is merely kept upon the premises, but neither on storage nor for sale."

In *Hanover Fire Ins. Co. vs. Eisman*, 45 Okla. 639, 146 Pac. 214, Ann Cas. 1918D, 288, the court held that gasoline was not "stored" within the meaning of the insurance policy where a small quantity thereof was kept on the premises in a closed metallic container for the purpose of occasionally cleaning the wearing apparel of the assured.

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In *Rafferty vs. New Brunswick Ins. Co.*, 18 N. J. L. 480, 38 Am. Dec. 525, 528, the court held that the keeping of liquor in a boarding house did not constitute storage. The court said:

"The liquors kept by this tenant were for the consumption of her family, or to be sold to the boarders or others. No part of the house was used as a warehouse, wherein spirituous liquors, or any other articles, were deposited for safekeeping and re-delivery in specie . . . [In *Langdon vs. New York Equitable Ins. Co.*, 6 Wend. 623] the court not only decided that a grocery, not being prohibited, might be kept in the building, but that the keeping of oil and spirituous liquors in the store, under the circumstances disclosed in the case, was not appropriating or using the building for the purpose of storing those articles, within the meaning of the policy. They define the term 'storing' as used by parties in this case, 'a keeping for safe custody to be delivered out in the same condition, substantially as when received'; and say it only applies *when the storing or safe keeping is the sole or principal object of the deposit, and not when it is merely incidental*, and the keeping is only for the purpose of consumption."

In *O'Niel vs. Buffalo Fire Ins. Co.*, 3 N. Y. 122, the court held that there was not a storage of oil and turpentine within the terms of an insurance policy where the same was left at a house for use in painting it. The court said that in order to constitute storage:

"The safekeeping is the principal object of the deposit."

See also to the same effect:

Dugan vs. Harry J. McArdle Inc., 172 N. Y. S. 27;
Walsh vs. F. W. Woolworth Co., 167 N. Y. S. 394;

Phoenix Ins. Co. vs. Taylor, 5 Minn. 492 (Gil. 393);
Williams vs. Firemen's Fund Ins. Co., 54 N. Y. 569, 13
Am. Rep. 620.

The recent decision of this court in *Marshall vs. World Fire and Marine Ins. Co.*, 149 F. (2d) 902, is analogous. Plaintiff delivered a valuable ring to Flato, a jeweler, for the purpose of sale through him. Defendant had issued to Flato an inland marine insurance policy referred to as a jeweler's block policy, which provided that in the event of any other insurance in the name of the assured or any third party for a less amount, this policy attaches on the difference. The store was robbed and the ring was stolen. Plaintiff held a policy from another company in the sum of \$20,000.00. Plaintiff sued for \$25,000.00, the value of the ring, Flato's agent, having agreed with plaintiff that he was fully covered with insurance for the ring and would be responsible for the safekeeping and return of the ring to her. This court properly held that under the terms of the defendant's policy its liability could not exceed the difference, that is, the value of the ring in excess of the other insurance, namely \$5000.00. So here this court should hold that under the plain terms of this policy appellant's liability thereunder cannot exceed the sum of \$10,000.00.

It is well settled that appellee is bound by the provisions of his signed application for the policy.

Paddleford vs. Fidelity and Casualty Co., (CCA 7) 100
F. (2d) 606, 611, cert. denied 306 U. S. 664;

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Employers Liability Assur. Corp. vs. Wasson, (CCA 8) 75 F.(2d) 749, 756;

8 Couch, *Cyclopedia of Insurance Law*, 7031, sec. 2175.

D. Additional Authorities Referred to on Page 59.

In *Oregon Washington R & N. Co., vs. Branham*, (CCA 9) 259 F. 555, this court reversed a judgment for plaintiff and said:

"None (proof) was produced, the case is brought within the general rule that the amount should not have been left to the conjecture of the jury . . . 'Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If that is not done, the jury cannot indulge in an arbitrary estimate of their own.'" (Citing authorities).

In *Wappenstein vs. Schrepel*, 19 Wn.(2d) 371, 142 P. (2d) 897, the court said:

"Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount. Where there is evidence as to injuries or loss resulting from various causes, for some of which the defendant cannot be held responsible, but no evidence of the portion of such injuries or loss for which the defendant may be liable, the proof is too uncertain to enable the jury to determine the amount of such injury or loss. *Lantz v. Moeller*, 76 Wash. 429, 136 Pac. 687, 50 L. R. A. (N.S.) 68; 25 C. J. S. 496. Damages, § 28."

In *Jones vs. Nelson*, 61 Wash. 167, 112 Pac. 88, the court said:

"Damages, in legal acceptation, mean compensation for the loss suffered or the injury sustained. The flats were built for renting. There is no evidence that there were any applications for rooms before the completion and delivery of the building. Damages will not be awarded unless they are based on something more substantial than guess, assumption, or speculation."

In *Bausch Mach. Tool Co. vs. Aluminum Co.*, (CCA 2) 79 F.(2d) 217, 227, the court said:

"The plaintiff was permitted to show by Haskell his estimate of its loss of profits during the period of which recovery was permitted. As there had never been any profits and no reasonable prospect that any would be made was shown as of 1925, his estimate was nothing but a guess based on conditions contrary to fact. It was too speculative to be admissible. *Eastman Kodak Co. v. Blackmore* (CCA) 277 F. 694; *American Sea Green Slate Co. v. O'Halloran* (CCA) 229 F. 77; *Central Coal & Coke Co. v. Hartman* (CCA) 111 F. 96."

In *Mission Marble Works vs. Robinson Tile and Marble Co.*, (CCA 9) 20 F.(2d) 14, this court said:

"It is well settled that proof of damages must be reasonable, definite, and certain."

In *Bigelow vs. R. K. O. Radio Pictures*, U. S. 90. L. Ed. 579, 585 (Adv. Op., decided February 25, 1946), Chief Justice Stone, speaking for the Supreme Court, said:

"In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guess work."

In *Armstrong vs. Town of Cosmopolis*, 32 Wash. 110,

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72 Pac. 1038, the court said:

“But while it is true that the weight of the testimony is entirely for the jury, yet *mere speculation and conjecture must not be confused with legitimate testimony*. There are many theories which might be advanced, which would be mere guessing, that would be as reasonable as the theory contended for by appellants The whims which seize and control intoxicated men and the accidents that are liable to occur to them are so manifold that it would be the merest guesswork to undertake to account for the location of the body of the deceased at the point where it was found as shown by the record in this case.

“We think there was no competent testimony adduced which should have been submitted to the jury.”

The *Armstrong* case was approved in *Reidhead vs. Skagit County*, 33 Wash. 174, 73 Pac. 1118, where the court said:

“We cannot ascertain the cause of the death, or see how any jury could consistently ascertain it from the testimony produced in the superior court. A jury’s verdict must be founded on evidence. It is within their province to decide as to the weight, or preponderance of testimony, under proper instructions of the court. But when there is a total failure of proof as to a material and controverted allegation, a jury has no right to speculate thereon.

“The case of *Armstrong v. Town of Cosmopolis*, supra, is amply sustained by the decisions of other courts. In *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729, which was an action to recover compensation for personal injuries, the court, in its opinion at pages 376-7, uses the following forcible language:

“It has been said by this and other courts repeatedly,

and is the established law, that a jury cannot properly be allowed to determine disputed questions of fact from mere conjecture. There must be some direct evidence of the fact, or evidence tending to establish circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, else the question should not go to the jury for determination at all. To allow a jury to reach a conclusion in favor of the party on whom the burden of proof rests, by merely theorizing and conjecturing, will not do. There must at least be sufficient evidence to remove the question from the realms of mere conjecture, else the trial court should pronounce the judgment of the law on the situation by taking the case from the jury when requested so to do.'

"Patton v. Texas & Pacific R. Co., 179 U. S. 658, 21 Sup. Ct. 275; Philadelphia & Reading R. Co. v. Schertle, 97 Pa. St. 450.

"Misfortunes often happen through causes which cannot be ascertained. Human laws and institutions cannot correct every wrong, or afford compensation for every loss or affliction. To uphold a verdict of the jury in a civil cause when there is no evidence to justify it, is not administration of justice, but the deliberate taking of the money or property of one party and transferring it to another.

"Tested by the rules of law above stated, we reach the conclusions that the trial court erred in not granting appellant's motion for a nonsuit."

In *Stone vs. Crewdson*, 44 Wash. 691, 87 Pac. 945, the court said:

"The time between the alleged cause and the actual miscarriage—thirty-three days—was, according to the

expert testimony, greatly in excess of the ordinary time in such cases; and the answers of the physicians to questions propounded to them, which were based upon the testimony, convince us that the jury could not have determined the proximate cause of the miscarriage without entering into the realms of speculation, conjecture, and guesswork, and this they are not empowered to do."

The foregoing was quoted with approval in *Anton vs. Chicago M. & St. P. Ry. Co.*, 92 Wash. 305, 159 Pac. 115, where the court said:

"Taking the opinion of the witness for the appellant, as quoted above, at its full worth, we think it is no more than a statement of a possibility or possibly a probability, more or less remote, that the tuberculosis is a result of the injury. This is not enough. The law demands that verdicts rest upon testimony and not upon conjecture and speculation. There must be some proofs connecting the consequence with the cause relied upon. The testimony, whether direct or circumstantial, must reasonably exclude every hypothesis other than the one relied on

"Granting that a possible or even probable connection between the present condition and the negligent act was shown by the appellant, we think respondent has so far overcome the showing as to leave the subject open to speculation and conjecture rather than to right reason."

In *Oklahoma Natural Gas Corp. vs. Municipal Gas Co.*, (CCA 10) 113 F.(2d) 308, 310, the court said:

"The burden is upon Oklahoma Natural (the plaintiff to ascertain by proof the amount of damages it sustained; and having failed to establish by proof the

amount of its damages, it is entitled to nominal damages only."

In *Western Union Telegraph Co. vs. Totten*, (CCA 8) 141 Fed. 533, 537, Judge Sanborn, speaking for the court said:

"The burden was upon the plaintiffs to prove the extent of their legal injury and to separate it from that *damnum absque injuria* for which courts and juries alike are forbidden by the law to grant relief. They failed to bear this burden . . . The record, however, is barren of all evidence of this nature and there is no way but by conjecture by which the jury could have determined the amount which the plaintiff paid for the cars of stock or the amounts which they paid for the other items which have been mentioned, and *neither courts nor juries may lawfully transfer the property or money of one citizen to another by guess*. The ruling constitutes a fatal error and the judgment must be reversed."

In *Schultz vs. Wells Butchers' Supply Co.*, 151 Wash. 382, 275 Pac. 737, the court said:

"We have also held to the principle that the damages for loss of anticipated profits of a business, while recoverable in any proper case, *must be shown with a reasonable degree of accuracy; the evidence must be clear and free from taint of speculation and conjecture*. See cases about cited and also *St. Germian v. Bakery & Confectionery Workers' Union*, 97 Wash. 282, 166 Pac. 665, *L. R. A. 1917F 824*, and *DeHoney v. Gjarde*, 134 Wash. 647, 236 Pac. 290."

See also to the same effect *Richardson vs. Owen*, 148 Wash. 583, 269 Pac. 838.

It is well settled that in insurance cases the general

rule applies that the burden of proof is on the plaintiff to prove the amount of recovery and all essential facts pertaining thereto.

In *Firemen's Fund Ins. Co. vs. Globe Navigation Co.*, (CCA 9) 236 Fed. 618, 627, involving a policy of marine insurance, this court said:

"With respect to the claim of appellee that the schooner was a total loss: the rule is that the burden of proving a loss for a cause and to an amount for which the insurers are liable is upon the assured."

In *Soelberg vs. Western Assur. Co.*, (CCA 9) 119 Fed. 23, 31, this court affirmed a directed verdict for defendant in a suit on a marine insurance policy, and stated:

"In order to entitle the plaintiffs to recover, it is essential for them, by competent proof, to show a loss which comes within the terms of their policy of insurance. They must bring their case within the provisions of the contract for insurance. They are bound by the lawful agreements and stipulations therein contained, and must satisfactorily prove a loss. The burden is, of course, upon them to establish their right to recover. This general principle is supported by abundant authorities." (Citing cases).

In 8 *Couch on Insurance* 7266, sec 2234, it is stated:

"In fact, establishment of the amount of loss is a condition precedent to recovery; that is, to warrant recovery on a policy, the insured must prove definitely the amount of his loss."

"Again the fact that proofs of loss admittedly have been duly furnished does not remove the burden from the

insured of showing the loss, and the amount thereof." etc. Ibid, page 7269.

In 6 Cooley's Briefs on Insurance, (2d Ed.) 5150, it is stated:

"It is incumbent on the insured to prove the value of the property destroyed and the extent of his loss . . .

"The burden is on plaintiff to show the value of his interest in the property destroyed, and unless he does so, he can only recover nominal damages."

See also to the same effect *Fidelity Union Fire Ins. Co. v. Kelleher*, (CCA 9) 13 F.(2d) 745.

E. *Additional Authorities Referred to on Page 61.*

In *Carruth vs. Aetna Life Ins. Co.*, 157 Ga. 608, 122 S. E. 226, 230, Chief Justice Russell, speaking for the court, and reversing the judgment in a suit upon an insurance certificate, said:

"What relation does the certificate bear to the policy? It cannot be assumed but that the obligation of the certificate was in the contemplation of both of the parties to the contract of insurance. The policy refers to the certificate, and the certificate refers to the policy as the basis of its issuance. In no event is any payment to be made except to the holder of a certificate. *The policy and the certificate are interlocked like the Siamese twins.* Contemporaneous instruments, each affecting and controlling the same subject-matter, to-wit, insurance of the life of an employee of the Lanette Cotton Mills by the Aetna Life Insurance Company, the two writings may be considered as *essential, indivisible parts of one contract. United it stands, divided it falls.*"

In *Seavers vs. Metropolitan Life Ins. Co.*, 230 N. Y. S. 366, 132 Misc. Rep. 719, in dismissing an action against an insurance company, the court said:

“The first proposal is that the certificate delivered to the insured contains the entire insurance contract, and that the failure to specify therein the manner of changing the beneficiary permitted the insured to determine how the change should be made. This contention is contrary to the statutory provision relating to group insurance and to the context of the certificate

“The statute does not attempt to clothe the certificate with the formality of a contract of insurance. The certificate is required as evidence of the contract and to apprise the insured of his rights thereunder. The provisions of the statute bear no other interpretation. The statements in the certificate follow the direction of the statutes, and this instrument does not purport to be the contract of insurance. The company certifies that the employee is insured ‘under and subject to the terms and conditions of group policy No. 468G.’ The language of the certificate is plain and unmistakable. There can be no complaint of vagueness of expression or subtle avoidance of clarity.

“The provision in the certificate that ‘the right to change the beneficiary is reserved’ is information of insured’s privilege under the policy. Instructions for consummating the change are *contained in the policy, and reference to this document is necessary for such purpose*. The method prescribed is a condition of the policy, and compliance therewith is obligatory in order to substitute another beneficiary. *Sangunitto v. Goldey*, 88 App. Div. 78, 84 N.Y.S. 989. The direction of the insured by will was not in conformity with the direction of the policy and did not effect a change of the beneficiary.”

In *Wann vs. Metropolitan Life Ins. Co.*, (Tex). 41 S. W. (2d) 50, 52, the court said:

"Under such contract the certificate issued to the plaintiff in error did not constitute the complete contract of Insurance. It merely evidenced his right to participate in the insurance provided by his employer *under the terms and conditions imposed in the group policy* when construed in connection with the certificate . . .

"Plaintiff in error's cause of action, as disclosed by his pleading, was based upon the issuance of the group policy. Obviously he was not entitled to recover by merely offering in evidence the certificate and rider attached thereto. These instruments disclose upon their face that they were not intended to and do not constitute a complete contract of insurance. Even if he had predicated his cause of action solely upon the certificate and rider, without any reference to the group policy, a recovery would not have been authorized when it was shown by the express terms of these instruments that they constituted but a part of an indivisible contract.

"It is argued that the certificate with rider attached issued to Wann was so complete in its terms that it was not essential for him to establish the provisions of the group policy. The parties to this contract expressly agreed that plaintiff in error was insured subject to the terms and conditions of the group policy. *However complete the terms of the certificate may appear to be, the fact remains that the parties agreed it should be subject to the terms and conditions of another instrument.* In the face of such an agreement plaintiff in error *had no right*, without the consent of the insurance company, *to change this contract so as to entitle him to recover without regard to the terms and conditions of the policy expressly made a part of the contract.* The terms of the certificate may have been ma-

terially modified by stipulations contained in the group policy.

"In order for plaintiff to set up a cause of action under the terms of the certificate, it was incumbent upon him to allege and prove that the provisions of the group policy, when construed in connection with the certificate and rider, entitled him to recover for the disability resulting from the injuries sustained in the service of his employer."

After quoting with approval the *Carruth* and *Seavers*

"The doctrine announced in the foregoing cases is but cases, *supra*, the court concluded:

the application of the familiar rule of construction that, where an instrument refers in specific terms to another instrument in such a way as to show a clear intention to make it a part of the contract, both instruments must be introduced in evidence before a recovery can be had thereunder. *Spande v. Western Life Indemnity Co.*, 61 Or. 220, 117 P. 973, 122 P. 38; *Bradstreet v. Rich*, 74 Me. 303; *Casey v. Holmes*, 10 Ala. 776; 13 C. J. 757.

"We do not deem it proper to pass upon the question as to whether or not plaintiff in error was shown to be totally and permanently disabled within the meaning of the language of the certificate, as upon another trial the certificate must be construed in connection with the terms and provisions of the group policy."

In *Adair vs. General American Life Ins. Co.*, (Kan. City Ct. App.) 124 S. W. (2d) 657, involving a similar situation with a group insurance policy and a certificate issued thereunder, the court said:

"A reading of the two instruments [contract and cer-

tificate] here partially quoted, discloses that the *contract of insurance*, upon which suit must be based, is made up of the following: (a) The group policy issued to the employer; (b) the application of the employer; and (c) the application of employee. The group policy and the certificate are so interdependent upon each other as to create a situation where the rights of plaintiff cannot be determined without reference to the group policy. *The conditions under which defendant is liable to plaintiff are made to depend, by reference in the certificate, on the conditions stated in the group policy.* Indeed, plaintiff's certificate could not issue except upon his *application* for a certificate *under* the group policy; and the certificate shows on its face that it was issued thereunder."

In *Watts vs. Equitable Life Assur. Soc.*, 125 W. Va. 209, 23 S.E. (2d) 923, the court stated:

"We think it clear that the group insurance policy, sometimes referred to as the master policy, is, ordinarily, and in this case certainly, the real contract of insurance upon which plaintiff must rely for recovery. In *Crawford and Harlan on Group Insurance*, section 15, page 31, it is stated: ' . . . the master policy issued and delivered to the employer is the real contract of insurance under the group plan, or, as it is frequently said, the primary contract. This is true because it is the basis of the certificate issued to the employee. It is the foundation of the insurance provided for the employee's benefit. It contains the terms and conditions of the insurance agreement, and in practically every instance the certificate by its own provisions states that it is issued in accord with the terms and conditions of the group policy to which it refers.'"

In *Ozanich vs. Metropolitan Life Ins. Co.*, 119 Pa. 52, 180 Atl. 67, the court said:

"The policy contract in suit includes not only *the group*

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or master policy, but also the certificate of insurance issued to the employee," etc.

In *Brown vs. Equitable Life Assur. Soc.*, (St. Louis Ct. App.) 143 S.W.(2d) 343, the court said:

"The rights of the employees or his beneficiary are to be determined under the provisions of the group policy, so that in an action upon the group policy the burden is on the beneficiary to show that the deceased employee was insured under such policy at the time of his death."

In *Thull vs. Equitable Life Assur. Soc.*, (Ohio App.) 178 N. E. 850, the court said:

"The errors complained of, in fact, all go to the matter of the contract's construction, and it may now be said that the certificate delivered by the employer to the employee is no part of the contract of insurance; but that the contract consists of the policy issued by the society to the employer and the application therefor. The employee's certificate is only a recitation of his right to protection under the terms of the contract, so long as the conditions of the policy are complied with."

In *Equitable Life Assur. Soc. vs. Austin*, 255 Ky. 23, 72 S.W.(2d) 716, the court said:

"The actual contract of insurance, from which Austin's right must be measured, was a group policy."

In *Magee vs. Equitable Life Assur. Soc.*, 62 N. Dak. 614, 244 N. W. 518, 85 A. L. R. 1457, the court said:

"The certificate issued to John Magee states he was 'insured for the sum of five hundred dollars with the Equitable Life Assurance Society of the United States

if death occur while in the employment of said employer and during the continuance of said policy.' The certificate expressly states, however, that this is 'subject to the terms and conditions of Group Life Insurance Policy No. 5,448,244.' . . .

"So far as John Magee was concerned, the employer canceled the insurance, without notice, unless he was discharged, and discharge would be notice. This action of the employer absolved the defendant from obligation. . . .

"So far as the defendant is concerned, the rights of the parties were fixed by the contract made with the employer. (Citing cases)

"The contract known as group policy No. 5,448,244 precludes liability thereunder, unless the name of the employee is certified to the assurance society, is not cancelled, and premiums are paid for him monthly. This nonliability here does not arise because the deceased was not in the employ of the company; but because the requirements of the insurance policy were not fulfilled for and on behalf of the deceased. His name was removed and no further premiums paid for him; hence the defendant is not liable on this certificate.

"It is said the defendant failed to notify John Magee that his name was no longer certified and that no further premiums were paid for him. The defendant was not obligated to do so."

See also the numerous authorities to the same effect cited in the Magee case.

F. *Additional Authorities Referred to on Page 62.*

In *State Farm Mutual Automobile Ins. Co. vs. Bonacci*, (CCA 8) 111 F.(2d) 412, in reversing judgment and hold-

ing that there was no liability upon an insurance policy, the court said:

“The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for findings are not necessary ‘for the purpose of review’ would be meaningless. If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses. In *Simkins Federal Practice*, 3rd Ed., page 488, in commenting on the effect of Rule 52 (a), it is said:

“The new practice, now incorporated in the Civil Procedure Rules, accords with the decisions on the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether the finding is U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731, the Supreme finding or of a fact inferred from uncontradicted testimony.

“Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the special qualification of the trial judge to pass on credibility.’

“The rule with reference to review of findings of fact in equity cases has often been announced by this court. (citing cases)

“In *Koenig vs. Oswald*, supra, (82 F.(2d) 85), we reversed the findings of the lower court in a fraud case because they were deemed to be contrary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand. While the findings of fact are presumptively correct, they are

not conclusive on appeal, if against the clear weight of the evidence. In *Keller v. Potomac Electric Co.*, 261 of a fact concerning which the testimony was conflict-Court, in discussing procedure in an equity case, said: 'In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses.'

In *Fleming vs. Palmer*, (CCA 1) 123 F.(2d) 749, 751, cer. denied, 316 U. S. 662, the court said:

"A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence. *Aetna Life Ins. Co. v. Kepler*, 8 Cir. 1941, 116 F.(2d) 1; *State Farm Mutual Automobile Ins. Co. v. Bonacci*, 8 Cir., 1940, 111 F.(2d) 412; *Manning v. Gagne*, 1 Cir., 1939, 108 F.(2d) 718; *Fed. Rules of Civil Procedure and The American Bar Institute Proceedings*, p. 316 et seq. (Cleveland, 1938); *Clark & Stone, Review of Findings of Fact*, 4 U. of Chi. L. Rev. 190 (1937)."

In *United States vs. Anderson*, (CCA 7) 108 F.(2d) 475, 478, in reversing judgment for plaintiff, the court said:

"The problem is one of construction, one of application of the taxing statute. In such situations, the findings of the trial court, while worthy of great consideration, are not conclusive, cf. Federal Rule 52 (a), Federal Rules of Civil Procedure, 28 U.S.C.A. following Section of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court. *Bogardus v. Commissioner*, 302 U. S. 34, 39, 58 S Ct. 61, 82 L. Ed. 32."

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In *MacGowan vs. Barber*, (CCA 2) 127 F.(2d) 458, 461, in reversing and dismissing the action, the court said:

“Though findings of fact by a trial judge are entitled to be given great weight on appeal from a decree in equity, such appeals involve a review of the facts as well as of the law. *Virginia Railway Co. v. United States*, 272 U. S. 658, 675, 47 S. Ct. 222, 71 L. Ed. 463; *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 464, 465, 20 S. Ct. 168, 44 L. Ed. 223; *Standard Accident Insurance Co. v. Simpson*, 4 Cir., 64 F.(2d) 583, certiorari denied sub nom. *Carolina Contracting Co. v. Standard Accident Insurance Co.*, 290 U. S. 688, 54 S. Ct. 123, 78 L. Ed. 593.”

In *O'Brien, Manual of Federal Appellate Procedure* (1941 ed.), at p. 20, the learned author states:

“Where finding of fact are contraary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand, the Appellate Court has power to reverse the judgment based thereon; while the findings of fact are presumptively correct, they are not conclusive on appeal if against the clear weight of the evidence.”

In *Gage vs. General Casualty Co.*, (CCA 9) 120 F.(2d) 925, 929, this court held that there could be no recovery against the defendant insurance company, that under the said Rule 52 (a) this court has a “broad power of review” of the district court’s findings of fact, and that said findings should be reversed if clearly erroneous.

In *Equitable Life Assur. Soc. vs. Ireelan* (CCA 9) 123 F.(2d) 462, this court reversed and dismissed an action to recover on an insurance policy and held that the findings

of fact made by the trial court were contrary to the evidence and should be set aside.

In *U. S. vs. Still*, (CCA 4) 120 F.(2d) 876, 880, the court reversed judgment for plaintiff in an action on a war risk insurance policy and held the findings of fact made by the trial court were clearly erroneous and should be set aside.

“An appellate court . . . will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury.” *U. S. vs. Aluminum Co.*, (CCA 2) 148 F.(2d) 416, 433, per Judge Learned Hand.

“It has often been held . . . that an upper federal court may regard the findings of a trial court as clearly erroneous because patently against the weight of the testimony.” (citing numerous cases)

Schultz vs. Manufacturers and Traders Trust Co. (CCA 2) 128 F.(2d) 889, 900.

“Since the facts are not in dispute, we are free to consider them and to reach our own conclusion, untrammelled by the district court’s findings and conclusions of law.”

Wigginton vs. Order of United Commercial Travelers, (CCA 7) 126 F.(2d) 659, 661, an insurance case.

To the same effect in *U. S. vs. Mitchell*, (CCA 8) 104 F.(2d) 343.

“Of course Federal Rule 52 does not require us to accept fact findings unsupported by the evidence. *Nor does this Rule require us to respect conclusions of law which do not rest properly on the facts so found. It is cer-*

tain that the principle giving the above described weight to the trial court's findings of fact, does not compel the reviewing court to give any specific weight to the trial court's conclusions of law, as it yet remains the duty of the appellate court to decide whether the correct rule of law has been applied to the facts found. Whether special findings are supported by the evidence or whether they give the requisite support to conclusions rendered thereon, are questions open to consideration here."

Campana Corporation vs. Harrison, (CCA 7) 114 F. (2d) 400, 405.

"The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. Such was the law prior to the promulgation of the Rules of Civil Procedure. *Brown v. United States*, 3 Cir., 95 F. (2d) 487, 490; *Dunn v. Trefry*, 1 Cir., 260 F. 147, 148. The new rules have worked no change in this regard, or with respect to the ultimate conclusions in jury-waived cases in particular. Cf. *Aetna Life Insurance Co. v. Kepler*, 8 Cir., 116 F. (2d) 1, 5. See also 3 Moore, Federal Practice, p. 3115, et seq., and notes of the Advisory Committee on Rule 52 (a). The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration. *State Farm Mutual Automobile Insurance Co. v. Bonacci et al*, 8 Cir., 111 F. (2d) 412, 415. Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. Cf. *United States vs. South Georgia Railway Co.*, 5 Cir., 107 F. (2d) 3, and

United States v. Mitchell, 8 Cir., 104 F. (2d) 343, 346. *An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52 (a) specifically provides."*

Kuhn vs. Princess Lida, (CCA 3) 119 F. (2d) 704.

G. *Additional Authorities Referred to on Page 63.*

Bearing in mind the rule of *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, *supra*, these elementary principles have been repeatedly applied in Washington.

In *Isaacson Iron Works vs. Ocean Accident and Guarantee Corp.*, 191 Wash. 221, 70 P.(2d) 1026, the court said:

"Appellant is, of course, entitled to stand upon its contract as written, and *the insured must bring himself within the terms of the policy before he can establish the insurer's liability thereon. Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, Couch Cyc. of Insurance Law, vol. I, § 57; 14 R.C.L., § 103, p. 926 . . .

"The parties to a contract of insurance may contract for any lawful coverage, and they are free to enter into any contract they desire. In the case of *Cosgrove v. National Casualty Co.*, 117 Wash. 211, 31 P. (2) 80, this court said:

"In the absence of some statutory provisions to the contrary, an insurance company has the right to limit its liability, and to impose restrictions and conditions upon its contractual obligation, not inconsistent with public policy."

"This doctrine is well stated in the text of Couch, Cyc. of Insurance Law, vol. I, § 57, as follows:

"It is axiamatic that *parties may make such a contract*

for insurance as they may see fit, provided the same does not contravene any provision of law or public policy, and this, even though the contract is improvident as to the insured.'

"This court has laid down the rule that, in construing policies of insurance, the general rules for construction of contracts apply. In the case of *Richards v. Metropolitan Life Ins. Co.*, 184 Wash. 595, 55 P. (2d) 1067, we said:

" 'A policy of insurance is a contract, and its language, like that of any other contract, must be given its usual and ordinary meaning, unless it is apparent from a reading of the whole instrument that a different or special meaning was intended, or is necessary in order to avoid an absurd or unreasonable result.' "

"In the earlier case of *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509, it was held that:

" 'Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain and ordinary meaning.' "

In *Godwin v. Northwestern Mutual Life Insurance Co.*, 196 Wash. 391, 83 P. (2d) 231, the court said:

"This court has held, in conformity with the general rule, that insurance contracts are to be construed in accordance with the general rules applicable to other contracts. In the case of *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509, we said:

" 'In thus construing the policy, we are not unmindful of the rule that policies of insurance are construed in favor of the insured and most strongly against the in-

insurance companies. *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 82 Pac. 113, 4 L.R.A. (N.S.) 636. But this rule should not be permitted to have the effect to make a plain agreement ambiguous and then interpret it in favor of the insured. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain and ordinary meaning."

In *Fidelity Union Fire Ins. Co. vs. Kelleher*, (CCA 9) 13 F. (2d) 745, this court said:

"Following the steadily adhered to decisions of the Supreme Court, it is seen that the present case is directly within the well settled rule of the federal courts, that the terms of the policy are the measure of the liability of the insurer, and that, to recover, the insured must prove that he is within those terms."

In the *Kelleher* case this court quoted with approval the leading case of *Imperial Fire Ins. Co. vs. County of Coos*, 151 U. S. 452, 38 L. Ed. 231, as follows:

"If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. *The terms of the policy constitute the measure of the insurer's liability*, and in order to recover, the assured must show himself within those terms . . . The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery . . . It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. *The*

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courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

See also to the same effect:

Massachusetts Bonding & Ins. Co. vs. Santee, (CCA 9) 62 F. (2d) 724;

Funk vs. Aetna Life Ins. Co., (CCA 9) 95 F. (2d) 38;
Associated Indemnity Corp. v. Wachsmith, 2 Wn. (2d) 679, 99 P. (2d) 420, 127 A.L.R. 531;

Black Masonry and Contracting Co. v. National Surety Co., 61 Wash. 471, 112 Pac. 517;

Trinity Universal Ins. Co. v. Willrich, 13 Wn. (2d) 263, 124 P. (2d) 950, 142 A.L.R. 1;

Miller v. Penn. Mutual Life Ins. Co., 189 Wash. 269, 64 P. (2d) 1050;

Kearns v. Penn. Mutual Life Ins. Co., 178 Wash. 235, 34 P. (2d) 888;

Richards v. Metropolitan Life Ins. Co., 184 Wash. 595, 55 P. (2d) 1067.

Roller v. Hartford Acc. and Indem. Co., 124 Wash., Dec. 456, 67 P. (2d).

H. *Additional Authorities Referred to on Page 67.*

In *Aetna Ins. Co. v. Sacramento-Stockton S.S. Co.*, (CCA 9) 273 Fed. 55, 59, Judge Gilbert speaking for this court said:

"Nor was it error to exclude testimony offered to show that, in applying for insurance, the plaintiff's agent agreed with the agent of the Union Marine Insurance Company that the only risks intended to be insured against were fire and collision. If the contract failed to express the intention of the contracting parties, the remedy was by a suit to reform the policy. *Insurance Co. v. Mowry*, 96 U. S. 544, 547, 24 L. Ed. 674."

In *Eddy v. National Union Indem. Co.*, (CCA 9) 80 F. (2d) 284, affirming your former opinion in 78 F. (2d) 545, this court said:

“An oral waiver with full knowledge is not capable of proof by parol evidence where the policy is in writing, and particularly where the policy expressly provides that such a wavier must be in writing, as in the case at bar.”

In *Leithauser v. Hartford Fire Ins. Co.* (CCA 6) 78 F. (2d) 320, cert. denied, 296 U. S. 645, 80 L. Ed. 459, the court said:

“Appellant’s suit was brought upon the contract of insurance delivered to him, and he cannot incorporate into it by parol a series of unrelated documents to effect a change in its terms. *Lumber Underwriters v. Rife, supra*, 237 U. S. 605, page 609, 35 S. Ct. 717, 59 L. Ed. 1140.”

In *Christian v. St. Paul Fire & Marine Ins. Co.*, (CCA 5) 5 F. (2d) 489, in dismissing an action upon an insurance policy, the court said:

“The policy in suit provides that defendant’s agent should not have the power to waive any of its terms unless the waiver be written upon or attached thereto. That provision is binding upon the assured. Whatever may be the rule in other jurisdictions, the Supreme Court of the United States is firmly committed to the view that, where a policy of insurance requires that a waiver by the insurer’s agent be in writing, it is not permissible to show a waiver by parol agreement or course of dealing with its agent. *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213; *Penman v. St. Paul Insurance Co.*, 216 U. S. 311, 30 S. Ct. 312, 54 L. Ed. 493.”

See also to the same effect:

- Northwestern National Ins. Co. v. McFarlane*, (CCA 9) 50 F. (2d) 539;
Kentucky Vermilion M. & Co. vs. Norwich Union Fire Ins. Co., (CCA 9) 146 Fed. 695, 698—701;
Fidelity-Phenix Fire Ins. Co. v. Queen City Bus & Transfer Co., (CCA 4) 3 F. (2d) 784, 786;
Lighting Fixtures Supply Co. v. Fidelity Union Fire Ins. Co., (CCA 5) 55 F. (2d) 110, 113, cert. denied, 286 U. S. 558, 76 L. Ed. 1292;
Trans-Atlantic Shipping Co. v. St. Paul Fire & Marine Ins. Co., 9 Fed. (2d) 720, 722—724;
Sebald v. U. S., (CCA 7) 73 Fed. (2d) 860, 295 U. S. 736, 79 L. Ed. 1684;
Northern Assur. Co. v. Grand View Building Assoc., 183 U. S. 308, 46 L. Ed. 213, and 203 U. S. 106, 51 L. Ed. 109;
Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S. 311, 54 L. Ed. 493, 498;
Lumber Underwriters v. Rife, 237 U. S. 605, 59 L. Ed. 1140;
 32 C. J. S., 828, 829, § 908;
Couch, Cyclopedia of Insurance Law, Vol. 8, § 2182, 7052- 7058;
Newsom v. New York Life Ins. Co., (CCA 6) 60 F. (2d) 241;
New York Life Ins. Co. v. McCreary, (CCA 8) 60 F. (2d) 355;
Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 58 L. Ed. 356;

I. LIST OF COAT OWNERS WHOSE RECEIPTS STATED NO VALUATION

referred to on page 68

Albrecht, Mrs. Earnest
 Bair, Mrs. Howard
 Balke, Mrs. Emma

Baur, Hattie
 Beauchene, Mrs. A. J.
 Carman, Mrs. Rex
 Cast, Mrs. Harold
 Clements, James
 Hagne, Harold J.
 Harnden, W. G.
 Logozzo, Elsie
 Metzger, Bee
 Moore, J. D.
 Morrill, Florence
 Munsil, L. W.
 Odell, Harry
 Orth, J. E.
 Reich, Mrs. Wm.
 Stuart, Agnes M.
 Souther, Frank
 Thomas, Elsie
 Tilton, Mrs. Rex
 Verd, Mrs. Charles
 Vivian, James
 Wait, Carlyle

J. *Additional Authorities Referred to on Page 70.*

31 C. J. 360 and 42 C. J. S. 476, define the term "in conjunction with" as "*combined with; in association with; united with*".

"Conjunction" is defined by Webster's New International Dictionary as follows:

"1. Act of conjoining, or state of being conjoined; union; association; combination . . . 3. *Occurrence together; concurrent or combination, as of events.* 4. An instance of conjunction; a conjoined or associated group; a combination; union; association."

Blaisdell v. Inhabitants of Town of York, 110 Me. 500,

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87 Atl. 361, 370;
Danzinger v. Cooley, 248 U. S. 319, 63 L. Ed. 266.

K. *Additional Authorities Referred to on Page 75.*

It is elementary that insurance is solely for indemnity and not for profit.

In *Lighting Fixtures Supply Co. v. Fidelity Union Fire Ins. Co.* (CCA 5) 55 F. (2d) 110, cert. denied, 286 U. S. 558, 76 L. Ed. 1292, the court said:

“The policy was an open one. It is a fundamental principle that such a policy of insurance is a contract of personal indemnity. The property is not insured against destruction, but the insured was guaranteed against loss, to the extent of his insurable interest, not exceeding the amount stipulated. As the betterments and improvements installed in the building passed to the owner at the expiration of the lease, in part consideration for the rent, appellant could not sell them, or remove them, or recover their value.”

In *St. Paul Fire & Marine Ins. Co. v. Scheuer*, (CCA 5) 298 Fed. 257, in reversing judgment against an insurance company, the court said:

“The plaintiffs may recover the amount of their actual loss, not exceeding the maximum amount of defendant’s liability under the policies; for the insurance policies are only contracts of indemnity. *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231. The adjuster’s agreement cannot by any possibility be construed to mean that the insurance company would pay to those having an insurable interest less than the whole interest more than the loss they actually sustained.”

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In *U. S. v. Supplee-Biddle Hardware Co.*, 265 U. S. 189, 195, 68 L. Ed. 970, 44 S. Ct. 546, Chief Justice Taft speaking for the court said:

“Life insurance in such a case is like that of fire and marine insurance, —a contract of indemnity. *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. Ed. 370, 9 Sup. Ct. Rep. 41.”

In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462, 38 L. Ed. 231, the Supreme Court said:

“Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms.”

In *Phoenix Mutual Life Ins. Co. v. Bailey*, 80 U. S., 13 Wall. 616, 20 L. Ed. 501, the Supreme Court said:

“Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensurative with the damages he sustained by the loss of or injury to the property insured.”

See also to the same effect:

Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 503, 10 L. Ed. 1044;

Couch Cyclopaedia of Insurance Law, vol. 1, p. 10, sec. 3, and p. 407, sec. 188a;

Cooley's Briefs on Insurance, (2d ed.) vol. 1, p. 120, 121, and cases cited;

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- 44 C. J. S. 477, sec. 14;
- 45 C. J. S. 1010, sec. 915;
- 26 C. J. 17, sec. 1;
- 32 C. J. 975, sec. 1;

L. *Additional Authorities Referred to on Page 76.*

In *Standard Sewing Machine Co. v. Royal Ins. Co.*, 201 Pa. 645, 51 Atl. 354, the court reversed the judgment because of excessive recovery in this respect and held that under a similar policy the plaintiff, who was a manufacturer, could recover only the cost to him of manufacturing the property destroyed. The court said:

"The first paragraph of the policy provides as follows: 'This company shall not be liable beyond the actual cash value of the property at the time any loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.' It is evident that in his ruling as to the measure of damages the learned trial judge did not properly construe this provision of the contract between the parties. The plaintiff was the "insured" and was the manufacturer of these machines. Under the clause of the policy just quoted, the loss could 'in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.' The court failed to give due weight to this provision of the policy. The actual cash value of the property at the time of the fire was the measure of damages, but it could not exceed what it would cost the insured to replace it. This would exclude the market value of the property as a measure of damages, and would permit the plaintiff to recover only what it would cost him, the insured, who was the manufacturer, to replace it. The language of the policy is plain and unambiguous, and the court should have interpreted it, and given the

jury the measure of damages suggested.”

The above case is directly in point and conclusive.

In *Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116, 44 N.W. 1055, the court reversed a judgment for plaintiff upon a similar policy. The plaintiff confined his evidence on damage to the market value of the lumber destroyed, and the defendant introduced no evidence of value. The court said:

“The measure of damages fixed by the parties in their contract was not to exceed the actual cost of producing the lumber destroyed. This was not the market or cash value. The court, therefore, adopted a standard of value in direct conflict with the agreement of the parties. On this point there can be no room for doubt. There is no difficulty in making the computation. If plaintiff bought the logs, the measure of damages would be the price paid, with interest from date of purchase, and cost of manufacturing and storing. If it purchased the stumpage, the measure would be the price of the stumpage, with interest, and the other costs added. If it owned the land from which the logs were cut, the measure would be the fair value of the stumpage, with the other costs added, and interest.”

In *Butler v. Security Ins. Co.*, 244 Ill. App. 379, involving a similar insurance policy, in reversing a judgment for plaintiff for the full retail value, the court said:

“This was error. The policy provided that the loss in no event should exceed the cost to the insured to replace the same with material of like kind and equal quality. This in no event could exceed the wholesale or manufacturer’s price, plus transportation and handling.”

IVL

In *Home Insurance Co. v. Tumlin*, 241 Ala. 356, 2 So. (2d) 435, involving a similar provision in an automobile collision insurance policy issued by this same company, the court said:

“Where a policy of insurance provides that the insurer’s liability for loss or damage to the property insured shall not exceed ‘what it would cost to repair or replace the automobile or parts thereof with others of like kind and quality’, the insured is entitled to recover only the cost of such repairs or replacements. Such a provision would be construed as a limitation of the insurer’s liability and the test or measure of damage which insured is entitled to recover. *Spivy-Johnson Portrait Co. v. Belt Automobile Indem. Assoc.*, 210 Ala. 681, 99 So. 80.”

In *Richards v. Bussell*, 70 Wash. 554, 127 Pac. 198, 129 Pac. 90, the court said:

“Now these contracts do not pretend to state the cost of the work, but only the limit of cost which must not be exceeded. *The word ‘cost’ as used in this section preceeding the proviso, as we have seen, manifestly means cost to the contractor aside from any profit to him.*”

In *Washington Machinery & Supply Co. v. Zucker*, 19 Wn. (2d) 377, 143 P. (2d) 294, the court said:

“In the contract before us, it was provided ‘. . . We each agree to pay to you an amount equal to the percentage of the total unpaid cost of the oven and equipment as set opposite our names; . . .’ It is our opinion that, in using the word ‘cost’ all parties meant and contemplated the *actual* cost of manufacturing the oven and procuring the equipment not handled by respondent.”

In *The Spica*, (CCA 2) 289 Fed. 436, 445, the court

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said:

“The meaning of costs is too clear for exposition; it means actual proved cost to contractor.”

In *Globe & Rutger Ins. Co. v. Prairie Oil & Gas Co.*, (CCA 2) 248 Fed. 452, 457, the court said:

“The actual cash value of the oil at the time of the fire was to be the measure of damages, *but it could not exceed what it would cost the insured to replace it.*”

In *Columbia Ins. Co. v. People's Exchange Bank*, (CCA 8) 109 F. (2d) 530, 531, the court said:

“*The obligation of the insurance company was to pay what it would cost the insured.*”

In *Insurance Policy Annotations* (1941) published by the Section of Insurance Law of the American Bar Association, Vol 1, p. 173, it is said:

“Although the cases hold that the basis of recovery is ‘the current market value’ at the time of loss or damage, ‘market value’ has been construed to mean the market used in purchasing the goods and not the market in which the goods are sold. For instance, in cases which involve the loss of goods in the hands of dealers, it is almost unanimously held that ‘cash value’ means replacement cost and not selling price.

(Idaho) *Boise Ass'n. of Credit Men v. U.S. Fire Ins. Co.*, 44 Idaho 249, 256 Pac. 523 (1927).

(Md.) *Mutual Fire Ins. Co. v. Owen*, 148 Md. 257, 129 Atl. 214 (1925)

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(N.C.) Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S.E. 236.”

See also to the same effect:

International Railway Co. v. Public Service Commission, 36 N. Y. Supp. (2d) 125, 134;

Great American Indemnity Co., v. Flour City Ornamental Iron Co., 48 Fed. Supp. 999;

McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N. E. 902, 904, 56 A.L.R. 1149;

Svea Fire & Life Ins. Co. v. State Savings & Loan Asso., (CCA 8) 19 F. (2d) 134, 136; also holding that *the burden of proof is on the plaintiff to show the cost of replacement of the property destroyed.* }

This language of the policy is taken from the New York Standard form of fire insurance policy. The Washington statute (Rem.Rev.Stat. of Wash. sec. 7152) provides:

“On and after January 1, 1912 no fire insurance company shall issue any fire insurance policy covering on property or interest therein other than on form known as the New York Standard as now or may be hereafter constituted, except as follows”; etc.

The exceptions stated are not applicable here.

See *Richardson v. Superior Fire Ins Co.*, 192 Wash. 553, 74 P. (2d) 192.

As held by this court in *Funk v. Aetna Life Ins. Co.*, (CCA 9) 95 F. (2d) 38, language in an insurance policy based on a statute, even if ambiguous, is not to be construed against the insurance company.

M. *Additional Authorities Referred to on Page 77.*

It is well settled that replacements of destroyed chattels do not constitute sales.

In *Helvering v. William Flaccus Oak Leather Co.*, 313 U. S. 247, 85 L.(2d) 13, the Supreme Court said:

"Thus, the single question is whether the amount respondent received from the insurance company derived from the 'sale or exchange' of a capital asset.

"Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words 'sale' and 'exchange' are not to be read any differently. Compare *Helvering v. Hammel*, 311 U. S. 504, ante, 303, 61 S. Ct. 368, 131 A.L.R. 1481; *Fairbanks v. United States*, 306 U.S. 436, 83 L.Ed. 855, 59 S. Ct. 607; *Burnet v. Harmel*, 287 U. S. 103, 77 L. Ed. 199, 53 S. Ct. 74. *Neither term is appropriate to characterize the demolition of property and subsequent compensation for its loss by an insurance company. Plainly that pair of events was not a sale. Nor can they be regarded as an exchange, for 'exchange' as used in § 117 (d), implies reciprocal transfers of capital assets, not a single transfer to compensate for the destruction of the transferee's asset.*"

In *Boyer v. State*, 19 Wn. (2d) 134, 142 P. (2d) 250, the court said:

"The second situation mentioned above, where the statute would apply, it, likewise absent here. The state has not *sold or leased* these tidelands to the city of Seattle. By chapter 177, Laws of 1929, it made an absolute gift to the city.

"A sale of property contemplates a consideration, or

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price, seller, a purchaser, and a delivery of the thing sold. For a list of cases defining the words "sale" and "sell", in conformity with the definition just given, see 38 Words & Phrases (Perm.ed.) pp. 99, 562. In *Spokane v. Baughman*, 54 Wash. 315, 103 Pac. 14, the question arose as to whether the serving of intoxicating liquors by a social club to its members at a price fixed by the club and charged to the account of the members constituted a *sale* within the meaning of an ordinance regulating the sale of such liquors. In answer to that question, this court said:

"A sale has been defined by Kent as an agreement by which one of two contracting parties, called the seller, gives a thing and passes the title, *in exchange for a certain price in current money*, to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price. It is defined in a more condensed statement by Blackstone as a transmutation of property from one man to another *in consideration of some price or recompense in value*."

"In the disposition which the state made of these tide-lands the essential elements of a sale are lacking. The state was not a seller, the city was not a purchaser, and there was no consideration, or price, paid or contemplated. The statute upon which the state now relies does not fit the situation presented here and is not applicable to it."

See also to the same effect:

Williamson v. Berry, 8 How. 495, 12 L.Ed. 1170, 1191;
Colyear v. Krakauer, 122 App. Div. 797, 107 N.Y.S. 739;
Washington v. Ogden, 1 Black (U.S.) 450, 17 L.Ed. 203;
Hartwig v. Rushing, 93 Ore. 6, 182 Pac. 177;
Close v. Browne, 230 Ill. 228, 82 N.E. 629, 13 L.R.A.
 NS 634;

State v. Colonial Club, 154 No. Car. 177, 69 S.E. 771,

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31 L.R. A. (NS) 371, Ann. Cas. 1912A 1079;
Union Securities v. Merchants Funds and Savings Co.,
 205 Ind. 127, 185 N.E. 150, 186 N.E. 261, 95 A.L.R.
 1189;
 47 Am. Jur. 216, 217, sec. 14.

App. N. (78)

SUBJECT TO TOTAL \$10,000.00 MAXIMUM LIMITA- TION,—LIST OF MAXIMUM INDIVIDUAL LIABILITY

<i>Name</i>	<i>Maximum Liability</i>	<i>Basis Therefor</i>	<i>Cash or Re- placement</i>
Albrecht, Mrs. Earnest	\$ None	Receipt	None
Andrews, Mabel	\$150.00	Receipt & Proof of Loss	\$ 87.33
Arteel, Mrs. W. J.	180.00	Rec. & P. L.	180.00
Babcock, Mrs. Ralph	10.00	P. L.	58.22
Bair, Mrs. Howard	None	Rec.	None
Balke, Mrs. Emma	None	Rec.	None
Basey, Mrs. Grace	200.00	Rec. & P. L.	116.44
Baur, Hattie	None	Rec.	None
Beauchene, Mrs. A. J.	None	Rec.	None
Beerman, Mrs. W. H.	200.00	Rec. & P. L.	200.00
Belaire, Mrs. Victor	200.00	P. L.	116.44
Bell, Doris Benoit	200.00	Rec. & P. L.	200.00
Bitter, Mrs. Gregory	200.00	Rec. & P. L.	200.00
Bloxom, Mrs. Merritt	200.00	Rec. & P. L.	200.00
Bobst, Mrs. Mae	150.00	Rec. & P. L.	87.33

Bodine, Florence	150.00	Rec. & P. L.	87.33
Brimmer, H. V.	200.00	Rec. & P. L.	116.44
Brown, Mrs. Fred F.	185.00	Rec. & P. L.	106.91
Bryson, Irene	200.00	Rec. & P. L.	200.00
Burke, Barbra G.	125.00	Rec. & P. L.	125.00
Busby, Mrs. Thomas	200.00	Rec. & P. L.	116.44
Buttke, W. H.	200.00	Rec. & P. L.	200.00
McNab,			
Helen Campbell	150.00	Rec. & P. L.	150.00
Carman, Mrs. Rex	None	Rec.	None
Cast, Mrs. Harold	None	Rec.	None
Chadwick, R. E.	150.00	Rec. & P. L.	150.00
Chance, May	100.00	Rec. & P. L.	100.00
Clarke, Glen L.	150.00	Rec. & P. L.	150.00
Clements, James	None	Rec.	None
Conkey, A. L.	250.00	Rec. & P. L.	145.55
Cox, Alice	100.00	Rec. & P. L.	58.22
Cronholm, Mrs. A. L.	200.00	Rec. & P. L.	116.44
Dasdice, J. A.	200.00	Rec. & P. L.	116.44
Dawson, Mrs. F. C.	500.00	Rec. & P. L.	600.00
	100.00	Rec. & P. L.	
Densmore, Mrs. W.	150.00	Rec. & P. L.	150.00
Dewar, Gladys N.	150.00	Rec. & P. L.	150.00
Dormaier, C. C.	200.00	Rec. & P. L.	200.00
Draper, Wm. C.	200.00	Rec. & P. L.	200.00
Edwards, Mrs. Floyd C.	50.00	Rec. & P. L.	50.00
Erickson, O. H.	200.00	Rec. & P. L.	200.00

LIII

Eschbach, Mrs. Ed.	100.00	Rec. & P. L.	58.22
Etl, Lillian	200.00	Rec. & P. L.	116.44
Eyman, Mrs. Chas.	200.00	Rec. & P. L.	200.00
Fetherstone, Mrs. J. E.	200.00	Rec. & P. L.	116.44
Fiebelkom, Hazel	25.00	Rec. & P. L.	14.56
Flater, Mrs. Mabel	250.00	Rec. & P. L.	250.00
Fleming, Mrs. Del	100.00	P. L.	58.22
Foran, Ruth	300.00	Rec. & P. L.	300.00
Fortier, Mrs. Geo.	200.00	Rec. & P. L.	200.00
Fox, Mrs. H. R.	150.00	Rec. & P. L.	87.33
Fraser, Mrs. Ronald	200.00	Rec. & P. L.	200.00
Fuqua, A. E.	150.00	Rec. & P. L.	150.00
Gannon, Gertrude	150.00	Rec. & P. L.	87.33
Goetz, W.	150.00	Rec. & P. L.	87.33
Griffith, Mrs. A. G.	150.00	Rec. & P. L.	150.00
Hagne, Harold J.	None	Rec.	None
Hall, Angeline	100.00	Rec. & P. L.	100.00
Hamilton, J. C.	175.00	Rec. & P. L.	175.00
Hanrathy, Agnes M. (now Mrs. Joe J.			
Sullivan, Jr.	200.00	Rec. & Release	200.00
Harnden, W. G.	None	Rec.	None
Hartman, Dean	150.00	Rec. & P. L.	150.00
Hayes, C. P.	200.00	Rec. & P. L.	116.44
Herrette, Minerva	150.00	Rec. & P. L.	150.00
Hillmer, Beatrice	200.00	Rec. & P. L.	116.44
Holtzinger, C. R.	200.00	Rec. & P. L.	116.44

LIV

Hornsberger, A.	75.00	Rec. & P. L.	75.00
Jarvis, Helen	180.00	Rec. & P. L.	180.00
Johnson, Fred E.	150.00	Rec. & P. L.	150.00
Jahr, Edna C.	140.00	Rec. & P. L.	140.00
Jones, M. W.	200.00	Rec.	116.44
Junker, Elizabeth	100.00	Rec. & P. L.	58.22
Kinney, C. H.	200.00	Rec. & P. L.	200.00
Kious, Mrs. Vernon	225.00	Rec. & P. L.	131.00
Knight, Ida	200.00	Rec. & P. L.	200.00
Krause, Mary Alice	150.00	Certificate	87.33
Leach, E. E.	200.00	Rec. & P. L.	200.00
Lisle, Ivan B.	200.00	Rec. & P. L.	116.44
Logozzo, Elsie	None	Rec.	None
Lowenthal, Carl	200.00	Rec. & P. L.	200.00
Lyon, W. F.	150.00	Rec. & P. L.	150.00
Mace, Clark	125.00	Rec. & P. L.	125.00
Magee, Patricia	100.00	Rec. & P. L.	100.00
Martinez, M. J.	200.00	Rec. & P. L.	116.44
McCorkindale, Elaine	200.00	Rec. & P. L.	200.00
McGilvery, G. F.	200.00	Rec. & P. L.	200.00
Meek, Elenor	200.00	Rec. & P. L.	200.00
Mercke, J. W.	200.00	Rec. & P. L.	200.00
Meser, Lucille H.	200.00	Rec. & P. L.	116.44
Metzger, Bee	None	Rec.	None
Miller, H. R.	300.00	Rec. & P. L.	174.66
Mixon, Betty	75.00	Rec. & P. L.	75.00
Mixon, Louise	100.00	Rec. & P. L.	100.00

LV

Moore, J. D.	None	Rec.	None
Morrill, Florence	None	Rec.	None
Marse, Mrs. Opal	150.00	Rec. & P. L.	87.33
Munsil, L. W.	None	Rec.	None
Nelson, Mrs. Elmer R.	150.00	Rec. & P. L.	150.00
Odell, Harry	None	Rec.	None
Orth, J. E.	None	Rec.	None
Palmer, F. C.	400.00	Rec. & P. L.	500.00
	100.00	Rec. & P. L.	
Patnode, Mrs. Mose	135.00	Rec. & P. L.	135.00
Peterson, Laura	200.00	Rec. & P. L.	116.44
Pollard, H. E.	100.00	Rec. & P. L.	58.22
Poulter, Merle	150.00	Rec. & P. L.	150.00
Pulos, Ada	100.00	Rec. & P. L.	100.00
Reich, Mrs. Wm.	None	Rec.	None
Reischl, Irene	200.00	Rec. & P. L.	116.44
Richards, Gordon	200.00	Rec. & P. L.	116.44
Ritchie, Clarence	200.00	Rec. & P. L.	200.00
Robinson, K. G.	75.00	Rec. & P. L.	75.00
Ross, Nan	200.00	Rec. & P. L.	200.00
Ryker, Rodney	200.00	Rec. & P. L.	200.00
Schmidt, G. A.	200.00	Rec. & P. L.	200.00
Schmidt, Mrs. Rudolph	200.00	Rec. & P. L.	116.44
Schoonover, Jack	200.00	Rec. & P. L.	200.00
Shaw, Verda Gayle	75.00	Rec. & P. L.	75.00
Shirran, W. C.	200.00	Rec. & P. L.	200.00
Souther, Frank	None	Rec.	None

LVI

Spinner, H. R.	200.00	Rec. & P. L.	200.00
Stanley, Dorothea	200.00	Rec. & P. L.	200.00
Stanley, Gladys	150.00	Rec. & P. L.	150.00
Stoltenow, B. W.	100.00	Rec. & P. L.	100.00
Stuart, Agnes M.	None	Rec.	None
Stumpf, John H	250.00	Rec. & P. L.	145.55
Taliaferro, Thelma	100.00	Rec. & P. L.	100.00
Thacker, Cecil	86.04	Release	86.04
Thomas, David G.	100.00	Rec. & P. L.	58.22
Thomas, Elmer	None	Rec.	None
Thompson, J. C.	200.00	Rec. & P. L.	116.44
Tilton, Mrs. Rex	None	Rec.	None
Timpke, Glen D.	200.00	Rec. & P. L.	200.00
Verd, Mrs. Chas.	None	Rec.	None
Vivian, James	None	Rec.	None
Wait, Carlyle	None	Rec.	None
Walsh, C. J.	200.00	Rec. & P. L.	200.00
Warner, A. K.	250.00	Rec. & P. L.	250.00
Weihl, Wright	200.00	Rec. & P. L.	116.44
Williams, D. A.	150.00	Rec. & P. L.	87.33
Wilson, Ed.	200.00	Rec. & P. L.	200.00
Wright, Delbert	100.00	Rec. & P. L.	100.00
York, Paul F.	350.00	Rec. & P. L.	350.00

TOTAL \$20,531.04

TOTAL \$17,403.02

No. 11376

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,

Appellee.

No. 11376

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

VELIKANJE & VELIKANJE,
E. F. VELIKANJE
E. B. VELIKANJE
S. P. VELIKANJE

Attorneys for Appellee,

415 Miller Building,
Yakima, Washington.

OCT 28 1916
PAUL P. O'BRIEN,
CLERK

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Attorneys for Appellee,

415 Miller Building,
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STATEMENT OF THE CASE

Appellee, Meryl Kirkevold, first started in the fur business in 1926, while still a student in high school, and has been in the fur business ever since said time—first working for others and ultimately owning his own shop.

In 1942, in the month of August, Mr. Kirkevold moved in with the Barnes-Woodin Company, having his own fur business therein and paying to the Barnes-Woodin Company a certain percentage of gross sales and business.

Previous to Mr. Kirkevold's taking over the space in the Barnes-Woodin Company, others had been engaged with the Barnes-Woodin Company in the fur business; so that Mr. Kirkevold took over the space formerly occupied by them, which consisted of a storage room on the second floor of the building, a sales room on the mezzanine and, in connection with said sales room, a work room.

All the insurance of Mr. Kirkevold had been handled through the Yakima agency of Hargreaves & Orkney. Hargreaves & Orkney had handled this insurance for Mr. Kirkevold in his previous locations in Yakima and had, also, handled the insurance of the former occupant of Barnes-Woodin Company (309 to 312). Mr. Orkney, upon being advised of Mr. Kirkevold's change of location prepared defendant's exhibit "A" (170), the same being prepared from the information then on hand, presented the same to Mr. Kirkevold for his signature, and pursuant to said applica-

tion the appellant issued an insurance policy being plaintiff's exhibit "1" (44), insuring customers' coats in possession of appellee.

The business of appellee expanded with great rapidity, and it was, therefore, necessary for him to secure additional space; and in the year 1943 appellee expanded his operations on the mezzanine floor and took over space which had been formerly used by the Barnes-Woodin Company for the storage of manikins and display material. So, from sometime in the year 1943 to May 9, 1944, appellee's business was composed of the following: He still retained upon the second floor of the building, a storage room where coats are placed for permanent summer storage. On the landing, adjacent to said upstairs storage room, there was a cleaning room where the coats were cleaned and demothed. On the mezzanine floor, there was appellee's retail sales room, which was completely closed off from the rest of appellee's operations on the mezzanine floor by walls constructed to the ceiling, and into which walls were display cases; and in one corner of this display room, being the northwest corner, was a door-way used for the purpose of entering his work room and mezzanine storage room. The south side of the show room was not closed off except by a low wall, so that a person could look off of the mezzanine into the main part of the store. Directly to the north of the show room was a narrow room, which has been re-

ferred to throughout the trial as a work room, in which the employees worked upon the coats, and in said work room was a large ceiling rack where were hung the coats which were being worked upon at the time, and on the north side of said work room were situate the sewing machines and other necessary machinery to be used by the employees for their work. Directly to the west of the show room was the space which had been formerly occupied as storage room by the Barnes-Woodin Company and which, in 1943, appellee took over for his own use. In said space he constructed a wall completely closing off the mezzanine balcony from the remainder of the store, leaving, however, a cat-walk between the wall which he constructed and the south railing, so that to use the balance of the mezzanine the Barnes-Woodin employees would not have to go into this room or through this room.

In this mezzanine store room appellee constructed a series of racks and hanging bars, some permanent and some movable; both the work room and the mezzanine store room were entered through the door-way from the show room. Though there was no door or other wall separating the mezzanine store room and the work room, there was a very decided jog in the walls around the show room which distinctly separated the two units. Off of said jogged space there was a door-way which let to a stairway, which was used by the employees while going from the mezzanine

work room and store room to their cleaning room and store room on the second floor, and which was, also, a fire escape to be used in the event of emergency to the outside. This door-way was kept unlocked during the day time for the convenience of appellee's employees, but always locked at night and when no one was in said establishment.

Appellee was engaged in the retail sale of furs and fur coats, and, also, the repair, alteration and storage of customers' coats. Appellee's procedure in the handling of the coats was—that when a coat would be brought in for storage, repair or alteration, the same was delivered to his retail show room, and from there the coat was taken to the mezzanine store room where it might remain for one to three months, depending upon the back-log of business, then the coat would be taken to the work room where any necessary work or repairs would be done upon it. It would then be taken to the cleaning room upon the landing of the second floor, and from there would be put into permanent storage in the second floor storage room. A coat which was left merely for repair or alteration would go through the same process, except that in the event it was not to be cleaned and stored, it would be taken from the work room after the necessary work was performed and returned to the mezzanine storage room, and would there await delivery to customers.

A person desiring to secure a coat would present him-

self at the show room and a person would be sent to secure the coat, either from the mezzanine store room or from the second floor store room, depending upon where the coat was located at that time.

On May 9, 1944, a fire broke out in the Barnes-Woodin building somewhere in the vicinity of appellee's work room. The cause of the fire was never determined, but was thought to be the result of defective wiring. There was no evidence that the fire was the result of a cigarette, as is intimated by counsel, for that is merely his own thought based upon no facts whatsoever.

As a result of this fire the coats that were situated at the time in the work room, and those in the mezzanine store room, and those in appellee's show room were almost completely destroyed. Other portions of the store were likewise gutted, but that is material only in this: that it shows that the fire was not solely centered in the appellee's business.

Appellee had other insurance covering his own stock of goods and equipment, and therefore the only question that remained for settlement was the question of coverage upon customers' goods in the possession of appellee.

Appellant assigned one R. B. Sinclair as adjuster, upon being notified of the loss. Mr. Sinclair worked upon said matter until about the 9th or 10th of July, at which time he

was transferred to California. Mr. Sinclair, however, was in an automobile accident (260) on or about the 24th or 25th of June, at which time his real adjusting on this matter was terminated.

Sometime late in July, Mr. L. M. McKinley was assigned as adjuster on this loss. The question then arose as to whether the \$10,000.00 or the \$100,000.00 coverage of the insurance policy applied to the loss in question. The parties being unable to agree, several conferences were held between the adjuster, counsel for the appellant, and the appellee and his counsel.

As a result of these conferences and being unable to reach a settlement, and because of the fact that there were approximately 150 people who had suffered a loss in said fire, making it too cumbersome to file a petition in interpleader, it was agreed that the appellee would make settlement with all of his customers, and that the appellant would pay him \$10,000.00 without prejudice to either of the parties to said transaction. The payment of the \$10,000.00 amount to be made proportionately as settlement was completed with customers.

Appellee proceeded with settlement, and appellant paid to appellee \$8,200.00, and held in reserve the sum of \$1,800.00 due to the inability of appellee to make settlement with several customers. Appellee within the proper time filed a formal Proof of Loss upon appellant, showing

loss in the sum of \$29,785.00. Subsequent thereto appellee instituted suit in the Superior Court of the State of Washington in and for Yakima County, against the appellant, Home Insurance Company of New York, giving credit to appellant for all moneys paid and requesting judgment in the sum of \$22,495.00 together with the interest at 6% per annum from May 9, 1944, until paid; said action was subsequently moved to the District Court of the United States for the Eastern District of Washington, Southern Division, by reason of diversity of citizenship, and the amount sued being in excess of the minimum allowed in said District Court.

Appellant, thereafter, filed an answer and counter claim against third-party defendants; all of said third-party defendants, however, defaulted in said cause of action and the question of their rights is not before this Court and are immaterial.

Appellee filed a reply, a request for a pre-trial hearing, and a request for admission; as a result of said admission appellant admitted the genuineness and validity of the releases and assignments. The Court granted a pre-trial hearing, and as a result of which the issues between the parties were narrowed down to the following specific questions:

- (1) As to the question of liability of the appellant, Home Insurance Company, under the terms and conditions

of the insurance policy, being a question of liability under the \$10,000.00 or \$100,000.00 provision to be determined by evidence and fact as to place of storage and interpretation of policy.

(2) As to the liability of the defendant, Home Insurance Company, based upon individual floater policies; that is, as to whether said policies are under the policy limitations, if there are such limitations, or whether they are in addition thereto.

(3) Actual amount of *loss dependent upon value of coats destroyed*, parties to be limited in proof of valuations but not to exceed three expert witnesses on each side, said number not to include the coat owners, who shall be allowed to testify in addition to experts.

(4) Liability to third-party defendant Dorothy Riggs and her claim in said action.

(5) Question as to when interest would begin to run on any amount of recovery.

And then the general further provision that it was further ordered that there was included and admitted at said pre-trial hearing that the number of coats destroyed or damaged is approximately 149, being the coats listed in the Proof of Loss, less certain ones which were to be omitted, together with the third-party defendants. That the Proof of Loss, as made by plaintiff is sufficient. That no claim

will be higher than the valuation set forth on the receipt issued to coat owners, except in the case of those coats upon which there was a separate policy with the company.

With this back ground, the cause of action went to trial before the Hon. Charles H. Leavy. Appellee offered evidence as to the value of each and every coat which was destroyed in said fire. The valuation of said coat being at the time of its destruction. The appellant offered no controverting testimony as to the values. The Court, at the close of the case, granted judgment to appellee in the amount based upon the valuation of the coats, as testified by appellee, with the exception that where appellee had made a cash settlement with a customer for less than the value of the coat, or less than the value claimed in the Proof of Loss, the amount was reduced to coincide with such cash settlement. Where the valuation had been fixed by a customer upon a receipt, the valuation was limited to that amount, except in certain cases wherein a separate floater policy had been issued to customers and the value of that policy was used therein as the basis of judgment.

The Court, however, did suggest that he wondered if appellee should not be limited in the amount of recovery based upon some replacement value of the other coats. Upon being advised of the pre-trial order, the pleadings and testimony, he however abandoned this thought.

However, after appellant moved for a new trial, the

Court changed his oral opinion and stated that our liability should be limited, and over objection a subsequent hearing was held, the only witness being the appellee himself, who testified to certain valuations consisting of retail value of coats sold or replaced, the amount of cash settlement and, also, the testimony as to his cost of doing business. As a result of which the Court reduced the amount of his former judgment to conform to the new figures, and granted judgment to appellee in the lesser sum of \$19,086.45; and it is from this judgment that appellant has appealed.

A few additional facts necessary to proper understanding of this case are in reference to the relation of the appellee and the agent of the insurance company. Mr. Kirkevold dealt exclusively with Mr. Orkney of the firm of Hargreaves & Orkney, the local representatives and agents of the appellant. Mr. Orkney testified that he was to the appellee's establishment very frequently and that he saw the building and the alterations as they were made therein. Mr. Orkney further testified that the premium for this insurance was based upon a monthly valuation of all of the customers' coats in the possession of appellee, including not only those in storage but those for repair as well (308); and that appellee paid double insurance upon the persons who held floater policies. That said coats belonging to persons holding the certificate or floater policy were listed at a maximum storage value of \$200.00 upon the

receipt, and in addition thereto a premium was paid to the company upon the value of the coat as listed in said certificate. All of these facts were known to Mr. Orkney.

Further, it is admitted in appellant's pleadings that all of the certificate holders filed due and timely Proof of Loss upon the full amount of their certificates.

ARGUMENT

In this argument we will first attempt to answer the several contentions advanced by appellant, and will then advance additional ones on appellee's behalf. For the purpose of easier reference we have used appellant's titles as the titles of our separate answering arguments.

The main question in this cause of action was whether that certain room on the mezzanine floor of the Barnes-Woodin Company constituted a storage room. Appellant's first contention is that the space on the mezzanine that was used for storage

A. "WAS NOT A ROOM."

This space was enclosed on the west by the permanent wall of the building, on the south by a plywood wall constructed by appellee, on the north by a permanent wall of the building adjacent to a stairway, and on the east by permanent constructed floor-to-ceiling show cases, the backs of which formed the east wall to this room. The only

place where this room was not enclosed was through the narrow passageway, or jog, that went from this storage room to the work room to the north and east. This mezzanine store room was a separate unit, distinctly separated from any of the other units used by appellee on the mezzanine floor. Appellant has attempted to infer and instill in the Court's mind that this is one room, and has made no distinction between the two spaces, but has referred to them as easterly and westerly ends. Appellee Kirkevold testified (173) that there were no tables, sewing machines or anything of that kind in the westerly part of the room where they have the store room. The testimony definitely showed without controversy that this room was used solely and exclusively for storage purposes. Coats and furs would remain in this room for a period from one to three months (223, 234).

Assuming, for the sake of argument, that there might be some basis to the contention of appellant that there was some work carried on within the general overall room, which fact we deny, we fail to find any restrictions in the insurance policy stating that the storage room must be used exclusively for storage. We believe the Court can take judicial knowledge of the fact that though we might eat our meals within the four walls of a kitchen of a house this does not change the fact that the room is a kitchen. We have contended throughout, and the trial court has seen fit to follow this contention, that the work room to the east of

the sales room was one room. And that the storage room to the west of the sales room was a separate and distinct room, both being separate units. This, in our opinion, is nothing more than a question of fact determinable by the trial court and which should not be disturbed unless the evidence preponderates against this finding.

Lewis vs. United States Seventh Circuit Court of Appeals, 113 Fed. (2) 489;

Kentucky Coal Lands Co. vs. Mineral Development Co., C. C. A. Ky. 295 F. 255;

Aetna Insurance Co., of Hartford Conn. vs. Licking Valley Milling Co., C. C. A. Ky. 19 F. (2d) 177.

As we have before set out, counsel would have this Court believe that there were no walls or partitions between the work room to the north and the store room to the west of the show room, by referring to the mere separation by show cases, we assume, with the inference to be drawn therefrom, that these are small type, regular show cases. These show cases extended clear to the ceiling (162) and were of a permanent built-in nature, the backs of which constituted a permanent wall.

B. "WAS NOT A STORAGE ROOM."

Counsel has attempted in the determination of the storage room and the work room to designate it as one continuous room, by reference to the easterly and the westerly portion thereof. We think "Exhibit 5" (the diagram), and

the testimony clearly shows that these were two separate units; and though they were connected were separate units, not only as to use but as to location. Counsel has argued that the only storage room used by appellee was that on the second floor, and that there was none situate on the mezzanine. This is contrary to the findings of fact of the trial court; and, we again state, should not be overruled or reversed, except where there are no facts to substantiate the court's ruling.

In the case of *Tollifson vs. People*, 49 Colo. 219, 112 Pac. 794, is cited the following definition:

"Webster defines a store house as a building for keeping goods of any kind, especially provisions, a magazine, a repository, a warehouse; and a store room as a room in a store house or repository, a room in which articles are stored."

Webster's New International Dictionary defines "store room" "1—a room for the storing of supplies or other articles, especially of a household or a ship.

2—space for storing in a store house or repository."

Bandosz vs. Daigger & Co., 255 Ill. App. 494, gives the following definition:

"Storage is the act of depositing in a store or warehouse for safe keeping."

Webster's New International Dictionary defines "storage" as follows:

"Act of storing or state of being stored; specifically, the

safe keeping of goods in a warehouse or other depository.

Space for the safe keeping of goods.”

Webster's New International Dictionary defines room:

“Space which may be occupied by or devoted to any object. Space enclosed or set apart by a partition; an apartment or chamber.”

When coats were brought in by customers for storage, appellee accepted the responsibility of that storage from the time that they were brought to him; and the storage charged for said coats began at the time they were delivered to appellee. Appellee maintained in his place of business two storage rooms—one upon the mezzanine floor where coats were stored pending the time when they could receive the attention of appellee's employees, and then be placed in the permanent storage upon the second floor. The mezzanine floor was designated by appellee and his employees as a storage room and not as a work room, contrary to the statements made by counsel; for the work room as referred to by appellee and his employees, and witnesses, referred to that space north of the show room and not to the over-all space of the mezzanine store room and the work room.

Counsel has made much of appellee's signing defendant's “Exhibit A”, which was the application for the insurance policy and which only listed the space used for

storage of customers' property upon the second floor of the Barnes-Woodin Company. This application was true at the time it was entered into, for that was in August, 1942, at which time that was the only space that was used for storage in that location; subsequent thereto, however, the appellee took over additional space on the mezzanine floor and converted that into a storage room by the building of a partition across the south side and the placing therein of permanent and movable racks, and which was used exclusively for storage. (193, 212 to 217). Further, it must be remembered that this application was prepared by the appellant's own agent; though it was true that it was signed by appellee. Appellant's agent, Mr. Orkney, however, was present many times during the construction of this new storage space (198 to 200-312).

It is, therefore, our contention that the company, thru their representative and agent, was at all times fully and completely advised of the changes and manner of operation of Mr. Kirkevold. There are no restrictions in the insurance policy "Exhibit 1", which limits Mr. Kirkevold to the having of only one storage room. As a matter of fact, the language of the \$100,000.00 limitation is in "storage rooms" (plural), "vaults" (plural), and "safes" (plural). It must be remembered that this insurance policy was written by the appellant and should be construed most liberally in favor of the appellee. Had the insurance company, appellant

herein, desired to limit the area of operation of appellee, they had that opportunity in the writing of their policy. 29 *Am. Jur.* 534, Par. 684:

“An insurance company may properly insert in its policies reasonable conditions as to the use of the property insurance. It has been held that a provision in the policy insuring a building “while occupied as” and for a specific purpose, if unqualified effects a warranty that the building will continue to be so used during the term of the policy, although, as a general rule, the mere description of a building as used for a certain purpose is not a promisory warranty that it shall be used for no other purpose. A privilege for all the process of the business insured will include an occupation necessary for the carrying on of such business.”

Appellant has referred to the general custom in the fur business, and that this policy was written in contemplation of this custom. It should be noted by the court that appellant offered no evidence of any other furriers as to what the custom was in the trade. Appellant, further, sets forth the contention that if the Court should follow the trial court's interpretation of this contract, there was no reason for putting in the \$10,000.00 limitation on the policy, for there would be no coats outside of storage rooms. We cannot agree with this contention, and neither did the trial court, for there were a considerable number of coats (20% to 25% of those destroyed) which were in the work room and which, at no time, has the appellee contended were in storage. Further, coats could be in the receiving room,

or other portions of the store, so that obviously there was some reason for this other limitation.

Counsel herein resents the inference of perjury as alleged by appellant on page 53 of his Brief, in stating that there had been no partition across the middle of the room prior to the imagination of counsel at the trial. We believe that there was no question as to how this room was constructed or where these partitions were and we challenge counsel to show any perjury in this trial.

We believe wholeheartedly with appellant's definition of storage as set forth on page 54 of its Brief, wherein they state

"Storage connotes a permanent keeping or holding of goods to await some future contingency."

We don't think there is any dispute but that these coats in the mezzanine storage room were held there for a period of one to three months to await the contingency of their repair, cleaning and transfer to the second floor storage room. We, therefore, contend, as we have contended throughout this trial, that the room where 75% of these coats were destroyed was a storage room under the terms and conditions of the insurance policy.

C. "FINDING AS TO PERCENTAGES OF LOCATION OF DESTROYED COATS IS PURELY SPECULATIVE."

It should be remembered by the court that this matter

came on for trial on the basis of a pre-trial order. Which order provided that the actual amount of loss would *depend upon the value of coats destroyed*. This method of proof was followed throughout the original trial. Appellant raised no objection to any of the values offered and submitted *no evidence whatsoever* on its own behalf as to the values of any of the coats which were destroyed. The trial court, however, contrary to the arguments of appellee's counsel, ruled that this was not the proper measure of damage and, upon the insistence of appellant, ruled that the measure of recovery would be based upon the amount of the cash payments to customers, plus the cost of replacements; which method of recovery reduced the amount as originally figured upon the actual value of the costs. The court in determining the number of coats in storage, and outside of storage, charged 75% of the coats to those in storage and 25% to those outside of storage. This was based upon testimony of Mr. Kirkevold and one of his employees, Hazel Fiebelkorn (125, 166, 167 and 224).

By this ruling, appellant has not been in any way prejudiced for the court has used the figure most advantageous to appellant, for the testimony was that 20% to 25% of the coats destroyed were outside of the storage room and the court used the figure of 25%.

45 C. J. S. 915, page 1010:

"The fact that the amount of loss cannot be determined

without difficulty, or to some extent is a matter of estimate, does not affect insurer's liability or insured's right to compensation."

D. "\$10,000.00 LIMITATION ALSO APPLIES TO
CERTIFICATES."

As was set forth in the facts, appellee, under the authority granted him by the appellant, wrote individual certificates or floater policies. It is our belief that a determination of this question is immaterial, for the court made no specific finding on this matter, the same being unnecessary as a sufficient amount of coats came within the \$100,000.00 limitation. These policies, however, were separate individual policies insuring the individual customer, and were a promise to pay; and as is admitted in the answer (25) it was admitted by appellant that it issued certain certificate endorsements to some of plaintiff's customers, and admitted that the customers named in said paragraph *timely filed proof of loss with said appellant*. This admission, on behalf of appellant, shows that sufficient proof of loss was made upon them and the action herein instituted was brought upon assigned claims from these certificate holders as well as the other customers. The insurance company, appellant herein, was therefore liable on these individual policies separate and apart from the other customers' coats held by appellee. A separate and additional premium was paid for this separate policy, as was testified to by appellant's agent, Mr. Orkney, (307) stating that Mr.

Kirkevold paid premiums twice on these certificate policies: first, in the payment in his monthly valuations; and second, as the overall premium for the issuance of this policy.

E. "JUDGMENT BASED UPON ERRONEOUS FINDINGS, INFERENCES AND CONCLUSIONS OF THE DISTRICT COURT MUST BE REVERSED."

We believe that we have fully and adequately answered this portion of appellant's argument in our answer against portion "A" of appellant's Brief.

F. "AMBIGUITY RULE IS NOT APPLICABLE."

Obviously, there must be some ambiguity or disagreement in the interpretation of this insurance policy, or the same would not have come for trial, and would not now be before this court on appeal. Therefore, we believe that there is an ambiguity question in the interpretation of this contract, and the application of the contract to the facts before the court; and, we contend that the general provisions of law upon the construction of such contracts apply to this cause of action.

Our courts have held continually that insurance contracts are to be construed liberally in insured's favor and strictly against insurer; and this particularly on an ambiguous insurance contract.

Kane vs. Order of United Commercial Travelers, 3 Wash. (2d) 355 at 359, 100 Pac. (2d) 1036

"It is the established rule in this, and many other states, that where a provision of a policy of insurance is capable of two meanings or is fairly susceptible of two constructions, that meaning and construction most favorable to the insured must be applied even though the insurer may have intended another meaning, because the insurer and not the insured is the author of the instrument."

Dowell Inc. vs. United Pacific Casualty Insurance Co., 191 Wash. 666 at 687, 72 Pac. (2d) 296.

"Respondent insists that the indorsement was not placed upon the policy for appellant's benefit but was for the benefit of those who may suffer damage from the operation recited in the endorsement. This contention is without merit. A liability policy is one in which the insurer assumes the liability of the insured.

"Respondent argues that, since the indorsement is not prepared by respondent nor by its experts, but that its form was imposed upon both parties to the contract, the general rule to the effect that ambiguous expressions in policies will be resolved against the insurance company is not applicable. While it is true that the existence of statutory endorsements may afford a reason for showing a tolerance in the application of this rule, we believe that this rule is applicable to the instant case in determining the intention of the parties to make indorsement number 1 an integral part of the master policy.

"The intention of the parties to the contract of insurance must be gathered from the contract itself from the risks excluded as well as for the risks included. In construing the language of the policy, if construction is needed, we are to keep in mind the familiar rule that the construction will be adopted which is most favorable to the insured.' There is another principle apply-

ing to contracts of insurance to the effect that if they are so drawn as to require interpretation and fairly susceptible of two different conclusions, the one will be adopted most favorable to the insured and will be liberally construed in favor of the object to be accomplished. And conditions and provisions therein will be strictly construed against the insurer as they are issued upon printed forms prepared by experts at the instance of the insurer, in the preparation of which the insured had no voice." (Italics ours)

Pennsylvania Indemnity Fire Corp. vs. Aldridge, 117 Fed. (2d) 774.

"But the general rule applicable in the interpretation of an insurance policy is that, if its language is reasonably open to two constructions the one most favorable to the insurer will be adopted. Any fair doubt as to the meaning of its own words should be resolved against the insurer as is said by the Supreme Court in *Aschenbrenner vs. United States Fidelity & Guaranty Co.* 'The phraseology on contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training and who rarely accepts it with a lawyer at his elbow, so if its language is reasonably open to two constructions that one more favorable to the insured will be adopted.' Moreover, unless it is obvious that words which appear in insurance policies are intended to be used in a technical connotation they will be given the meaning which common speech imports. In this respect, the rule is the same as in statutory construction."

Hawkeye Casualty Co. vs. Western Underwriter's Ass'n. 53 Fed. Supp. 256.

"The authorities are uniform that an insurance contract is to be construed most favorably to the insured and that no *strict technical interpretation* of the contract should be made." (Italics ours)

Massachusetts Bonding & Insurance Co. vs. John R. Thompson Co., 88 Fed. (2d) 825.

"Unless the words of such a contract (insurance) are obviously intended to be used in a technical sense, they will be given the meaning that common speech imports."

Williamsburgh City Fire Insurance Co. vs. Willard, 164 Fed. 404.

"Words used in a policy of insurance should be given their common, ordinary meaning rather than that of the lexicographers or those skilled in the niceties of language."

Other citations too numerous to list follow this same theory of the law, and there seems to be no dispute as to this law, and this is particularly so in the State of Washington where this contract must be interpreted.

G. "APPELLEE IS BOUND WHETHER OR NOT HE READ THE POLICY CONTRACT."

We have no argument with the law as set forth by appellant under this heading; but it should be borne in mind by the court that the application for this insurance policy was admittedly prepared by the agent of the appellant from information which he had on hand, and that he did not request of appellee any further or additional information, and that he at all times knew of the conditions and facts surrounding appellee's operations and that said insurance policy did not in any way restrict appellee's growth or expansion, or make any provision that he notify

the company of any changes or alterations in his business operation. We must accept progress and expansion and that must be assumed by the appellant in the issuance of its policies. From the monthly report prepared by appellee and delivered to appellant, through its agent, the company was advised of the increasing amount of business handled by appellee; and if they were desirous of further information as to how his business was handled or changed, they had the right to request it or make provision for such information in their policy.

H. "KNOWLEDGE OF AGENT IS IMMATERIAL"

We disagree with appellant's argument, for the principal is bound by the knowledge of his agents.

Higgins vs. Daniel

5 Wash. (2d) 134, 105 Pac. (2d) 24;

L. J. Dowell, Inc. vs. United Pacific Casualty Insurance Co., 191 Wash. 666, 72 Pac. (2d) 296;

Miller vs. United Pacific Casualty Insurance Co., 187 Wash. 629, 60 Pac. (2d) 714;

Alaska Steamship Co. vs. Pacific Coast Gypsum Co., 78 Wash. 247, 138 Pac. 875;

Staats vs. Pioneer Insurance Association, 55 Wash. 51, 104 Pac. 185.

Appellant made no showing of limitation of authority on their agents, and their agent Orkney was the only person with whom Mr. Kirkevold ever dealt, and was the per-

son upon whom he called when desiring information as to his policies and to whom he reported on all his activities.

I. "ERRORS IN ADMITTING APPELLEE'S EVIDENCE."

Appellant has not shown where he has in any way been prejudiced by the admission of any evidence or exhibits in this cause of action. It must be remembered that this was an action tried before the court, not before a jury. Appellant took exception to the admission of plaintiff's Exhibit 8, being a small notebook in the handwriting of appellant's agent, and listing the various insurance policies, and stating therein that appellee was insured under the policy in question in the sum of \$100,000.00.

Obviously, where the trial court charged 25% of the coats destroyed against the \$10,000.00 provision of the insurance policy, it shows that the court was not misled by this figure or by the exhibit, and no attempt was made by this evidence to alter or amend Exhibit 1, the written contract between the parties hereto.

Appellant objects to the admission of plaintiff's Exhibits 6 and 7, being advertising circulars, showing the publication of appellee's coverage, and were offered for this purpose only, and no attempt was made to make this advertising material binding upon the appellant, or in any way incorporated in the insurance policies.

Appellant's objection to Exhibit 4 is not well taken, for

Exhibit 4 was merely an original copy of an assignment on the McGilvery coat, a copy of which had been previously served upon counsel for appellant under the request for admission, and which appellant admitted in its answer to said admission, admitting the genuineness and validity of all of the releases and assignments and, further, said assignment was admitted in open court (68) by the admission of all of said matters when Exhibit 3 was admitted in evidence.

We do not believe that appellant herein can raise any objection to plaintiff's Exhibit A-1 at the subsequent hearing, being a note book containing the various figures relating to the transaction on the replacement of coats, for this material was furnished at appellant's insistence, and the amounts and all the matters shown in said note book were testified to in open court; so that appellant was not in any manner prejudiced by the admission of this note book which was kept by one of appellee's employees in the ordinary course of business.

J. "LIABILITY AS TO EACH COAT CANNOT EXCEED
VALUATION, IF ANY, STATED ON THE
RECEIPT THEREFOR."

Where a receipt was issued upon a coat and where the receipt stated no valuation, no claim has at any time been made for any amount in excess of the valuation listed upon

said receipt. Many of the coats, however, had a valuation listed higher than that as finally claimed by appellee and appellant received the benefits of this reduction. The only exception to this rule was where coat owners, whose coats appellee had in storage or in his possession for repair, had a certificate or floater policy. In that case, appellee had made it a custom to list the valuation of that coat at \$200.00. Appellee, however, included in his monthly report the value of the certificate. This was testified to by appellant's agent, Mr. Orkney (306). In other words, the Company at all times received the full premium on these valuations, and this was within the knowledge of appellant's agent (307). Some of the coats which were received by appellee contained no valuation, this was particularly true of many of the coats which were held by appellee for repairs and remodeling only, and which were not held for permanent storage. Why no valuation was stated on said receipts seems to be an error of appellee's employees in the receiving room. However, appellee paid the premium to the insurance company on the coats which he held for repair as well as those he held for storage (308). There were also a very few coats for which, for some unknown reason, no receipt was ever issued; but all of said coats whether receipted, whether valued or otherwise, were all valued in the monthly report delivered to the appellant and the premium of insurance was paid upon such valuation. The valuation, as testified to by Mr. Kirkevold on those coats where no valua-

tion was set, was the valuation which he listed and reported to the appellant on his monthly reporting system.

Appellant has suffered no loss through these acts of appellee, and as was stated in *Ohio Casualty Insurance Company vs. Miller*, 29 Fed. Supp. 993:

“It is a well recognized rule that courts do not favor forfeiture of insured’s rights in any kind of insurance contract where there has been a substantial compliance with the terms.”

The Insurance Company accepted the premium and issued insurance upon the valuations as submitted in the monthly reporting system, and they should not now be allowed to plead technicalities and reap the benefit of their bargain without assuming the liabilities which are imposed and assumed by them.

Appellant had the right under the policy (49) to at any time inspect any records and avail itself of any information, and they should not now plead their own neglect as a defense.

It should be borne in mind that each of the certificate holders filed separate proofs of loss for the full amount of their certificates so that the insurance company has not been misled by the filing of a proof of loss of a smaller amount, and they have made no offer to refund any insurance premiums accepted by them for the additional amount of coverage which was paid for twice.

Appellant on page 72 of its brief has raised some objections to Proposed Findings of Fact and Conclusions of Law (398), which were proposed under the Trial Court's original decision. However, the Court refused to sign these Proposed Findings of Fact and Conclusions of Law. They are not a part of the record and were never made an exhibit in the case. For that reason they are not a part of the action or rightly before this Court for consideration. It should also be noted that appellant proposed no Findings of Fact and Conclusions of Law of its own, and made only some form of objection to appellee's proposed findings as ultimately submitted, not the ones which are included and referred to as part of the record at 398.

Also, the Court changed its theory of recovery and did not base its decision upon the valuation of the specific coats; for the valuation of these coats, at the time of their destruction, was in excess of the amount which was submitted under the original Finding, due to the fact that the appellant was given credit for the amount saved on some of the cash settlements; and the valuation is much less than the proof of loss which, in our opinion, would be the maximum amount of recovery to which we would be entitled.

Appellee submits, however, that the maximum amount of proof of loss should be considered and appellee should not be limited in his amount of recovery to the value listed on each specific coat referred to in the proof of loss. For,

as before stated, the appellant was given the advantage of the fact that some of the coats were not as highly valued as originally listed in the proof of loss. With the right of taking this benefit, the appellant should also be subject to the detriment of increased amounts on certain coats if it was found that the coats as originally listed in the proof of loss were in error for they should not be entitled to take the benefits and scorn the detriments where it makes no change in the total amount as claimed.

K. "LIABILITY CANNOT EXCEED AMOUNT STATED
IN APPELLEE'S PROOF OF LOSS, NOR
AMOUNTS PAID."

We believe that we have fully answered this contention in the previous argument, in stating that the total amount of our amounts claimed are not in excess of our proof of loss and judgment granted is not in excess of the cost to the appellee of the replacement of the coats made, and the cost of the actual cash expended in making settlement.

L. "LIABILITY ON REPLACED COATS CANNOT EX-
CEED APPELLEE'S WHOLESALE COST."

We cannot follow appellant's argument that the amount of their liability on replaced coats should not exceed appellee's wholesale cost. The terms of the Policy are (48 and 49)

“This company shall not be liable hereunder . . . nor in any event for more than the cost to repair or replace the article with materials of like kind and quality.”

The court will note that this does not state that the liability is limited to the cost of purchasing the article, but is limited to the cost of replacing the article. The Court in determining the amount of this judgment deducted from the retail cost of the coat what appellee testified was his net profit; and, also, deducted from the amount of the replacement of his retail cost of the coat any other operation expenses that appellee was not obligated to pay due to the fact that this was replacement, such as his percentage payment to the Barnes-Woodin Company and other expenses.

There can be little argument but that the cost of replacing an article would include the costs of alteration and the necessary payment of appellee's employees to see that the coat was fitted, handled and properly presented and styled to the customer's satisfaction. As a matter of fact, the Court denied to the appellee himself (365) any amount of time or labor that he expended himself in the settlement of these claims or their replacement. The Court admittedly took a figure which was not one as definitely testified to as being specifically and exactly the amount of loss necessary to do business.

Again, it should be remembered by the Court that this method of reaching the judgment was one which was in-

sisted upon by the appellant and was contrary to the pre-trial arranged method of reaching valuations. And it should be further remembered that the appellant offered no evidence whatsoever, to show what these valuations might be, nor did appellant offer to the Court any other method, or any other testimony, which the Court could use in reaching a decision.

We again cite to the Court 45 C. J. S. 915, which sets forth the rule that the court is given the right to use estimate and some form of speculation in reaching the judgment. We do not believe the appellant should now be heard to complain that the method which he insisted upon is wrong and that due to his neglect in offering contrary testimony the Court followed the testimony of appellee. The decision as reached by the Court upon this method is beneficial to appellant for it reduced the amount of judgment as originally determined by the Court.

Appellee objected to this method of determining judgment, contending that the valuation of coats at the time of the fire was his proper method; and though appellee did not appeal from this ruling, and is not now attempting to be heard upon any objection, we believe it should be cited to the court that this is the wrong method and that appellant benefited by the Court's final method.

45 C. J. S. 1013, Sec. 915,

"While there is authority to the contrary, it has been

held, as a general rule, or in the absence of a provision for such measure, that the cost of restoring or replacing the property is not the measure of the insurer's liability for its loss, although the cost of replacing goods or buildings may be considered as evidence of the value of the property. However, under some statutes insured may elect whether to accept from insurer the repair of the property damaged or a sum of money equal to the damage done; and a provision of a standard policy form that the loss or damage shall in no event exceed what it would cost insured to repair or replace the property has been held valid as to personalty. Where a statute or the policy limits the amount of recovery as to the cost of restoring, replacing or repairing the property, the measure is the cost of such restoration or replacement, and not the cash or market value of the property damaged or lost, or the difference between the values before and after the fire, unless the insured property is such that it cannot be replaced within a reasonable time, in which case its actual cash value may be recovered. Such a provision contemplates the restoration of the property to substantially as good condition as it was in before the fire, and is material when the fire has not resulted in a total loss, but if the property cannot be restored to its former condition the difference between the sound value and the value of the remains as salvage determines the amount of loss. Under such a provision an increase in the cost of repairing by reason of building laws or regulations has been held included, but the contrary has also been held, especially where such increase is excluded by a provision in the policy.

"A policy provision that the loss or damage shall in no event exceed what it would cost insured to repair or replace the property with material of like kind and quality has been held to constitute merely a limitation on the amount of recovery and not a substantive measure of damages which insured may invoke. In the absence of such provisions, it has been held that the cost

of repairing the article plus any difference between its value as repaired and the sound value on the date of the fire is to be awarded. If the value is to be arrived at by replacement or reproduction cost, it has been held that depreciation may not be deducted from the cost of replacement and restoration.

"It has been held that, where insurer refuses to replace the property destroyed with other property or to furnish money to replace it, it cannot insist that the loss should be measured by the value of the property it refused to buy." (Italics ours)

In view of the last paragraph of the last cited section, the appellant herein had the opportunity to go out and settle with the public, or it had the opportunity to advance to appellee sufficient sums of money to make settlement with customers who were insured under this policy. However, the appellant decided to stand upon its \$10,000.00 limitation and did not go out and make settlement itself, or advance to the appellee any moneys with which to make settlement. It is true, that by agreement they did advance \$8,200.00, but only after appellee had made settlement with customers in excess of \$20,000.00; therefore, they let the appellee assume the responsibility and take the gamble of any recovery, yet they now desire, and the Court granted them the right, to come in and profit by appellee's ability to make lesser settlements by the replacement of coats at actual wholesale price, plus cost of doing business, out of his own funds and stock. Therefore, they allowed to appellee no profit, or no gain, to which he should have

been entitled due to his gambling on the right of recovering from the insurance company.

M. "INSURANCE IS SOLELY FOR INDEMNITY, NOT FOR PROFIT."

We believe this theory of law is true where an insurance company advances the money and makes it possible for the appellee to indemnify himself, but where the insurance company withholds the funds and refuses to make payments not upon a loss suffered by appellee, but upon a loss suffered by third persons; then we submit that the appellee should be entitled to any profit he has made through his own ability of making good settlement, and has secured assignment of the customers' loss.

N. "APPELLEE'S GROSS PROFIT RATHER THAN NET PROFIT SHOULD BE DEDUCTED."

We believe that this section of appellant's argument has been fully answered in the preceding two arguments, for we could not say that the cost of replacing a house is merely the cost of the materials which go into that house, and that we will allow nothing to assemble and build house or structure, for this same theory of law would go to the replacement of a fur coat which would need repairs, alterations, fittings and handling.

O. "REPLACEMENTS ARE NOT TAXABLE AS SALES."

Many of the coats which appellee sold were sold at a

price substantially in excess of the amount that the purchaser had coming from the previous loss. Some persons purchased a more valuable coat, and others found that the valuation that they had listed upon their receipt would not replace a coat of like kind and character, and it was therefore necessary for many of the people to pay a substantial balance. As a matter of fact, the coats which appellee sold to persons who had a credit coming from the fire loss amounted to \$4,712.47 in excess of the replacement allowance or cost. It has been our contention that this amount should have been allowed wholly to appellee as a profit from his sales for naturally he suffered many original sales from which he would have made his normal profit by the Court's stating that he must give to the appellant the credit for the replacement, for we believe that it can be assumed many of these people who replaced coats would have, during these prosperous years, purchased a new coat which would have been clear profit to appellee. However, in the computing of the judgment appellant was given the benefit of this overage, though the Court did allow appellee to deduct from that amount the 20% federal luxury tax which he was obligated to pay on his sales. From this method as used by the trial court, the appellant gained \$1,151.01 more than it should have, even by the method as used by the trial court.

MOTION TO STRIKE

We believe that this fully answers appellant's brief and arguments, with this exception—that appellant has attempted to continue his arguments and avoid the court rules of eighty pages by listing additional argument under the heading of "Appendix" and for this reason we hereby move that the appendix be stricken from appellant's brief or that the brief be not given consideration due to the violation of Court Rule No. 20-2(f) for said Rule provides that there shall be included in the appendix only matters of statute, treaty, regulation or rule, or matters quoted from opinion; yet appellant has listed as one item on appendix pages LI to LVI an argument relating to the determination of values on coats, which are items clearly not within the purview of quotations or citations. Likewise, there are similar quotations on appendix pages XL and XLI, and arguments are continually interspersed in the remainder of the appendix; however, if the Court recognizes this as properly part of the appendix, we wish to state in relation to the coats and the listing of the items therein that the Court did not use this method in reaching the amount of its judgment, but reached a method as requested and demanded by appellant for the actual expenditure of cash and replacement of coats, which was to their benefit and which they should not now be heard to object to.

CONCLUSION

The appellee in conclusion, therefore, states that if any errors have been committed by the court in the trial of this action, they were errors beneficial to the appellant and detrimental to the appellee. The appellee, however, has raised no objection to these errors, and this Court should therefore affirm the trial court's judgment as the same was based upon fact and was a factual matter determinable by the trial court and which should not be upset or altered by this Court.

Respectfully submitted,

VELIKANJE & VELIKANJE
E. F. VELIKANJE
E. B. VELIKANJE
S. P. VELIKANJE

Attorneys for Appellee
415 Miller Building
Yakima, Washington



No. 11376

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,

Appellee.

No. 11376

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
JOHN GAVIN
WALTER J. ROBINSON, Jr.
Attorneys for Appellant

426 Miller Building
Yakima, Washington

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For the most part appellee's contentions have been already fully answered in our opening brief. Appellee's brief contains numerous errors, inaccuracies, and misstatements of fact and law, so that within reasonable reply brief space limitations it will be impossible to discuss all of them. We shall, however, reply briefly to the more important errors therein.

With only rare exceptions, no record citations are given by appellee as required by the rules of this court. These are evidently omitted for the reason that the record does not substantiate such statements.

Appellee has not even attempted to distinguish any of the numerous authorities cited by us in our opening brief.

Moreover, with one or two minor exceptions, appellee has not cited any authority whatever in support of any of his contentions herein. This is readily understandable, however, in view of the unsound nature of those contentions .

For the sake of convenience we shall reply to appellee's principal contentions in the same order and under the same headings as they appear in appellee's brief.

A. WAS NOT A ROOM

As shown on the diagram, exhibit 5, the general shape of this space in question may be described as somewhat similar to a straight-back chair consisting of the back, seat,

and front legs, with the rear legs omitted. However, of course it was not that narrow. The same extended for the most part in an easterly and western direction with what might be called a jog in the middle in a northerly and southerly direction.

However, appellee's reference to this as a "narrow passageway" (p. 12) is clearly not correct. No witness testified that this was a narrow passageway. All of the evidence, including the diagram, exhibit 5, clearly shows that this was not a narrow passageway, but was the wide middle portion of the space or alleged room in question.

Appellee is also clearly in error in stating (p. 2) that there were walls between this space or alleged room and the sales room. It is undisputed that the only dividing line was not a wall, but was a high row of show cases in which fur coats for sale were hanging in the sales room. (162, 269-70, 276-7). This space was not a room, because it was not enclosed on all sides by either walls or partitions.

Again on page 12 appellee erroneously refers to "the work room to the east of the salesroom." It is undisputed that there was a work room to the north and west of the sales room, but not to the east thereof. Appellee's adroit suggestion (p. 12-13) that there was a work room to the east of the sales room and a separate storage room to the west of the sales room, is purely a figment of the imagination and contrary to all of the evidence.

While it is true that the show cases between the sales room and the work room extended to the ceiling, there was no evidence that the same were of a permanent built-in nature as erroneously stated by appellee. (p. 13), nor that the same constituted a permanent wall.

Appellee suggests (p. 13) that this was merely a question of fact and that the trial court's ruling should not be disturbed unless the evidence preponderates against the same. There are at least two conclusive answers. (1) The evidence clearly does preponderate against the decision of the trial court. (2) This was *not* a disputed question of *fact* at all, but simply a case where the trial court and appellee have drawn incorrect inferences and conclusions from the basic facts which stand undisputed. For these reasons the judgment should clearly be reversed.

B. WAS NOT A STORAGE ROOM

This is admittedly the principal question in the case, as if our contention is correct, most of the other questions become immaterial.

Contrary to appellee's vague suggestion (p. 13), it is undisputed that there was never any wall or partition of any nature between the north and east ends of this alleged room—which appellee concedes was the work room—and the west end thereof, which appellee calls “the store room”—whatever that may mean. (160, 219-20, 272-3).

This term is repeatedly used by appellee apparently on the theory that any room in a store may be classified as a store room. The court, however, will bear in mind that the insurance policy contract does not anywhere use the term "store room," but on the contrary uses the term "*storage room.*"

What appellee means by the term "two separate units" (p. 14) we are at a loss to understand. Nowhere is such a term used in the policy contract nor in the evidence. Appellee offers no valid reason why we should so classify what is actually a single room—if it be a room at all, which we deny—and which was used for a single purpose, namely, as the work room for repairing, fitting, and altering fur coats, and as incidental thereto, temporarily hanging up the same until they could be reached to be worked upon.

On the very first page of his brief appellee concedes that when he moved into the Barnes-Woodin store and when this policy was issued, his facilities "consisted of *a storage room on the second floor of the building, a sales room, on the mezzanine, and, in connection with said sales room, a work room.*" (All italics are ours). The same arrangement of space and rooms continued thereafter up to the time of the fire.

Even if this space was a room, in view of the undisputed facts that there was *no wall or partition of any nature dividing the same into two rooms*—how in the name

of common sense can it be said that this room consisted of two rooms, namely, a work room and a storage room?

Council misconceive entirely our contention when (p. 18) they resent inference of perjury. We have never accused anyone of perjury in testimony as to the lay-out and arrangement of the space in this store. No one testified that there was a wall or partition across the middle of this room or space, nor that the same consisted of two separate rooms. Consequently how could we accuse anyone of perjury in so testifying when no one has so testified? What we did say, and what we now repeat, is that *this contention that two rooms grew where only one grew before, was and is the unsupported fruit of the over-productive imagination of counsel.*

We agree with appellee's admission (p. 18) that "*there was no question as to how this room was constructed or where these partitions were.*" That is precisely the principal ground of our appeal. Since there was *no partition and only one room*, if any, how could anyone rightfully contend that the same consisted of two separate rooms?

Appellee concedes (p. 3) that "there was no door or other wall separating the mezzanine store room and the work room." He contends however that there was a jog in the wall of this room. Appellee cites no evidence or authority whatever that a mere jog in the walls or an irregular shape of a room has the legal effect of dividing

the same into two separate rooms. His position is manifestly absurd.

Appellee repeatedly erroneously states (p. 4, 12) that the coats remained hanging in the work room from one to three months. Appellee cites no evidence to that effect, and there is none. Testimony was undisputed that the coats remained hanging in the work room for only approximately one month until they were reached for repair work, and then they were placed in storage on the second floor. (201, 224).

Appellee concedes (p. 12) "though we might eat our meals within the four walls of a kitchen of a house, this does not change the fact that the room is a kitchen." Just so. So here the mere fact that incidentally coats were temporarily hung in the west end of the work room until they could be reached to be worked upon, does not change the fact that the room was, primarily at least, a work room and not a storage room.

Manifestly the west end of the work room did *not* constitute a *storage room* when it admittedly was not even walled or partitioned off from the remainder of the work room.

In a futile attempt to avoid the effect of appellee's signed application for this policy (ex. A; 169-172) he contends that a subsequent change occurred in the store ar-

rangement. It is undisputed, however, that although there was some remodelling of the mezzanine in 1943, the method of conducting the business remained the same. At the time of application for issuance of this policy and continuously thereafter up to the time of the fire, it was the uniform practice to hang customers' coats temporarily in the work room until the same could be reached to be worked upon and then they were placed in the storage room on the second floor. (213, 215, 219-20, 228-31, 234-6). The mere fact that the business grew and additional movable racks were placed in the west end of the work room and a plywood partition placed along the *south side* of the work room manifestly did not transform the same into a storage room.

Whether or not Mr. Orkney saw this incidental remodelling is wholly immaterial. If, as stated in appellee's application, the only storage room for customers' fur coats in this store in 1942 was on the second floor and there was none on the mezzanine, that likewise remained true at the time of the fire in 1944.

Appellee's own evidence shows that up to the time of the fire the west end of this work room contained "fur pieces that we use for repairs." (173, 223). In other words, this was all incidental to the primary purpose and function of this space or room, namely, a work room.

Appellee himself testified:

"Q. Now as I understand, right from March, 1942 when you first went in there, you always had the problem of what to do with the fur coats that were waiting to be repaired and worked on, didn't you? You had to keep them somewhere, didn't you?

"A. *We always had to hang them someplace. . . .*

"Q. *And at that time you used the same method, didn't you, of hanging it out in this room here on the mezzanine floor until you got around to working on that coat in its regular order, that is right, isn't it?*

"A. Yes." (205-6).

The only changes made in the remodelling in 1943 were to add additional movable racks and place a partition on the south side. (179, 181-2, 193, 210-1).

"Q. Isn't it a fact that you used the same method in 1942 and 1943 as you did in 1944, namely that fur coats of customers that were waiting to be repaired or worked on, you kept them there in the mezzanine floor, rather than in the storage room on the second floor?

"A. *Oh, we always had coats hanging all over down there.*

"Q. You always did, and that was true in '42, also?

"A. Yes.

"Q. *And the coats that were hanging there in 1942 and '43, were coats that were waiting to be worked on the same as in '44. That is right, isn't it? . . .*

"A. Yes." (181-2).

In answer to this direct question by the court, appellee testified:

"The Court: Before you built this place, where were those coats?

"A. Well, we didn't have the number and *they were hanging on little racks out here in this work room, right in the work room.*" (201).

Appellee's witness, Bernice Stevens, employed by him continuously since April, 1943, testified:

"Q. What duties did you have relative to coats that came in for repair or for storage?

"A. I received the coats and gave them their necessary receipts.

"Q. And then what did you do with the coat?

"A. *I hung it on the work rack, just through the curtains.*" (232).

"Q. Are you familiar with the processing of them before they are put into storage?

"A. Yes.

"Q. *Are coats put directly into storage?*

"A. No." (234).

It is undisputed that appellee never even contended to the insurance adjusters that any changes had been made after issuance of the policy. (291).

Admittedly coats brought in for repairs, as distinguished from storage, at all times remained on the mezzanine floor, and were never placed in the storage room on the second floor. (325).

At page 16 appellee concedes:

“Counsel has made much of appellee’s signing defendant’s “Exhibit A”, which was the application for the insurance policy and which only listed the space used for storage of customers’ property upon the second floor of the Barnes-Woodin Company. *This application was true* at the time it was entered into, for that was in August, 1942, at which time *that was the only space that was used for storage in that location.*”

Appellee’s statements (p. 10, 16) that Mr. Orkney saw any such changes is not correct. Appellee’s own evidence, however, clearly establishes that no substantial change in this respect occurred prior to the fire. Mr. Orkney testified that the only change he ever noticed there was the removal of a desk. (301). Appellant was never notified that any changes occurred. (309).

At page 13 appellee concedes that “storage connotes a *permanent* keeping or holding of goods to await some future contingency.” This concession should eliminate any further controversy, as it is undisputed that the only room for permanent summer storage was on the second floor.

Tollifson vs. People, 49 Colo. 219, 112 Pac. 794, cited briefly by appellee (p. 14), merely declined to reverse a

verdict of a jury that *a room used exclusively for storage* of mining machinery, equipment, and ore was a storage room. In other words, the situation there was precisely the same as appellee's room on the second floor, but not as to the mezzanine.

C. FINDING AS TO PERCENTAGES OF LOCATION OF DESTROYED COATS IS PURELY SPECULATIVE

Contrary to appellee's suggestion (p. 19) we have never admitted that we were liable for the value of the coats destroyed. This storage room issue was specifically listed in the pre-trial order and has been at all times definitely urged.

As pointed out in our opening brief, it is undisputed that this work room space, if a room at all, consisted of one single work room and not two separate rooms. The attempt to segregate the coats as 75% in one room and 25% in the other is completely contrary to the evidence and based upon wholly unwarranted speculation and conjecture. Appellee admittedly was not even there on the day of the fire or for a considerable time prior thereto. All of the witnesses agreed that after the fire the premises were in such a "mess" that it was impossible for anyone to make a reasonable estimate thereof. (125-6, 175-6, 186, 197, 251, 261, 269, 320).

Under these admitted circumstances appellee is not

aided by his quotation from 45 C. J. S. 1010, sec. 915. This does not justify mere speculation, guesswork, and conjecture. The remainder of this section reads as follows:

"The insurer's obligation or liability under a policy of fire insurance is measured and defined by the terms of the policy; the insured is entitled to recover to the extent of his loss occasioned by the fire, not exceeding the maximum amount stated in the policy.

"The obligation or liability of an insurer under a policy of insurance is measured and defined by the terms of the policy, and cannot be enlarged or varied by judicial construction.

"Since a contract for insurance against fire ordinarily is a contract of indemnity, as discussed supra § 14, insured is entitled to receive the sum necessary to indemnify him, or to be put, as far as practicable, in the same condition pecuniarily in which he would have been had there been no fire; that is, he may recover to the extent of his loss occasioned by the fire, but no more, and he cannot recover if he has sustained no loss. Also insurer's liability cannot exceed the maximum amount named in the policy. Speculative collateral questions should not be allowed to enter into the ascertainment of actual value."

Recovery based on pure speculation is not permissible. *Foss vs. Pacific Tel. & Tel. Co.*, 126 Wash. Dec. 87, 94, ——— P. (2d) ———, decided October 1, 1946.

D. \$10,000.00 LIMITATION ALSO APPLIES TO CERTIFICATES

Appellee complains (p. 10, 20) that he paid double insurance upon these certificates. It is undisputed, how-

ever, that appellee paid nothing for these certificates, but merely collected premiums thereon from customers desiring the same, and remitted the same to appellant. Naturally an additional premium charge was made to such customers, as they received additional insurance protection of the coat *at any location*, whether in or out of this store.

Appellee erroneously states (p. 11, 29) that the pleadings admitted that all of the certificate holders filed due proof of loss upon the full amount of their certificates. Not so at all. The answer merely admits that they filed *timely* proof of loss. (25). This admission has no material bearing whatever on any issue on this appeal. These obviously were not separate policies, but expressly incorporated the terms and conditions of the master policy, including the total maximum \$10,000.00 limitation. The mere timely filing of proof of loss creates no liability under the contract where none existed in excess of \$10,000.00.

A reading of the complaint shows that this is *not* an action to recover upon assigned claims.

F. AMBIGUITY RULE IS NOT APPLICABLE

Appellee speciously contends (p. 21) that there must be "some ambiguity or disagreement," or there would be no litigation. The obvious answer is that there *is* *disagreement* but there is *no ambiguity* in the language of

the contract. As pointed out at page 62 of our opening brief, the rule contended for by appellee applies only where the contract is ambiguous, and hence has no application here. This is particularly pointed out in the Washington cases cited in appedix G therein, page XXXV.

G. APPELLEE IS BOUND WHETHER OR NOT HE
READ THE POLICY CONTRACT

Appellee's contention (p. 24-25) that by some legerdemain the effect of the limitation clauses of the contract was changed by the gradual growth of appellee's volume of business is we submit utterly absurd. As above pointed out, the method of carrying on the business remained the same, and the effect of the contract likewise remained the same.

J. LIABILITY AS TO EACH COAT CANNOT EXCEED
VALUATION, IF ANY, STATED ON THE RECEIPT
THEREFOR

Any high school boy knows that where appellee recovered several hundred dollars for destruction of a coat as to which no valuation was listed on the receipt, appellant is being held liable for more than the valuation stated on the receipt. The judgment herein was therefor for this reason also clearly erroneous. Under the contract where no valuation was stated, no recovery can be had. Naturally appellee is bound by the negligence and mistakes of him-

self and his own employees. Appellant cannot be bound thereby contrary to the contract.

Ohio Cas. Ins. Co. vs. Miller, 29 Fed. Supp. 993, cited by appellee (p. 29) held that the insurance company was *not* liable because of failure to give timely notice of the accident as required by the policy. Moreover here we are not asking for a forfeiture, but merely for maximum limitation of the amount of our liability as provided in the contract.

Manifestly the fact that each month appellee advised us of a total figure of customers' coats on hand and paid the premium thereon does not in any way abrogate or modify the contract provisions as to appellant's maximum liability in the event of fire. It is true that we are subject to the liabilities assumed by us in our contract, but that liability should not be extended either by appellee's wishful thinking nor by this court imposing upon the parties a new contract to which they never agreed.

It is undisputed that neither appellant nor its agent, Mr. Orkney, at any time inspected appellee's records or had any knowledge as to the contents thereof.

Nowhere in appellee's brief does he even attempt to explain or justify definitely and specifically how he arrived at the amount of the judgment herein. Nor is the same shown by the findings. The amount of the judgment

is grossly excessive and must be reversed.

Appellee manifestly has no better right to recover a greater amount on any particular coat than was claimed therefor in the proof of loss than he would have to recover a larger total amount than that claimed in the proof of loss. He is bound by his sworn proof of loss, not only as to the total, but as to the amount claimed for each particular coat.

L. LIABILITY ON REPLACED COATS CANNOT EXCEED APPELLEE'S WHOLESALE COST

Appellee says that one of the items in the pre-trial order was "loss dependent upon value of coats destroyed." *But nothing was said in the pre-trial order as to whether this was wholesale value or retail value.* Obviously we are not precluded thereby from contending that under the contract appellee cannot recover more than the wholesale value or cost to him of replacing the articles.

Appellee says (p. 32) that the liability is not limited to the cost of purchasing but to the cost of replacing. However obviously for a retail dealer such as appellee the cost of replacing means the cost of purchasing at wholesale.

Contrary to appellee's erroneous statement (p. 33), 45 C. J. S. 1010, sec. 915, does not authorize recovery based on speculation.

Appellant quotes 45 C. J. S. 1013, sec. 915, that cost of replacing is not the measure of liability *in the absence of* a provision therefor in the policy. Here, however, there was such a provision. Moreover the black letter statement therein immediately preceding the portion quoted by appellee is as follows:

“Provisions in a policy of fire insurance limiting liability to the cost of replacing, restoring, or repairing the property will be enforced; in the absence of such provision, the authorities are not uniform as to whether such cost is the measure of liability.”

The only case cited in 45 C. J. S. 1014, note 84, quoted in italics by appellee on page 35, commencing *“it has been held that, where insurer refuses to replace . . .”* is *Gulf Compress Co. vs. Pennsylvania Ins. Co.*, 129 Tenn. 586, 167 S. W. 859; but it did not relate to wholesale costs at all, but only to a *single* opportunity to purchase certain similar machinery from another certain individual *four months* after the fire. Clearly that has no applicability here.

Prior to the commencement of this suit appellant paid appellee the sum of \$8200.00, being nearly all of the admitted liability. If appellee had made settlement with all of the coat owners, the full \$10,000.00 would have been paid. Obviously appellant had the right to litigate these questions, and especially to contend that its liability did not exceed \$10,000.00. By so doing it still had the right to contend that in any event it is not liable to appellee for

more than his wholesale cost of replacing the coats, under the policy language quoted in our answer. (27).

Appellee testified to his wholesale cost of replacing these coats, which of course includes the cost of manufacture. Nothing should be added thereto for fitting, as he did not so testify.

O. REPLACEMENTS ARE NOT TAXABLE AS SALES

Appellee offers no reason (p. 37) why the trial court increased the amount of our liability in the sum of \$3561.46, representing 20% federal luxury sales tax on the full retail value of all replacements, as pointed out at page 76 of our opening brief—especially in view of the fact that appellee admittedly has never paid such a tax and clearly is not legally liable therefor, as held by the U. S. Supreme Court. *Helvering vs. Flaccus*, 313 U. S. 247, 85 L. Ed. 13.

MOTION TO STRIKE

Appellee's motion to strike clearly has no merit. Rule 20-2(f) of this court expressly authorizes quotations from opinions in appendix of brief. *Nothing* in that rule, however, provides that an appendix *must be limited* to opinion quotations, statutes, treaties, regulations, or rules. The rule expressly authorizes the same but not exclusively. It is always recognized that tabulations of evidentiary matters, such as our appendix I and N, is proper and convenient for the court and counsel. Realizing the grossly

excessive and indefensible amount of recovery, appellee has studiously refrained both in the findings and his brief from specifying definitely how he arrived at the amount of this judgment. The matters in appendix I and N should have been in the findings, but were intentionally omitted. Our appendix does not contain arguments, but merely a few brief explanations relative to the opinions quoted.

Appellee says (p. 38) that the court did not use this method in reaching the amount of his judgment. *That is why the judgment is erroneous and should be reversed.*

CONCLUSION

We therefore submit that the judgment is clearly erroneous and grossly excessive, and the same should be reversed with directions to enter judgment in the sum of \$1800.00, less appellant's costs in both courts.

Respectfully submitted,

CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
JOHN GAVIN
WALTER J. ROBINSON, Jr.
Attorneys for Appellant

No.

11376

IN THE
United States Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

THE HOME INSURANCE COMPANY OF
NEW YORK, a corporation,

Appellant,

vs.

MERYL KIRKEVOLD, doing business as
BARNES-WOODIN FUR DEPARTMENT,

Appellee,

No. 11376

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

PETITION FOR REHEARING

VELIKANJE & VELIKANJE,
E. F. VELIKANJE
E. B. VELIKANJE
S. P. VELIKANJE
Attorneys for Appellee

415 Miller Building
Yakima, Washington.

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E. B. VELIKANJE
S. P. VELIKANJE
Attorneys for Appellee

415 Miller Building
Yakima, Washington.



The Honorable Judges of the United States Circuit Court of Appeals for the 9th Circuit, having on the 26th day of March, 1947, filed an opinion modifying and affirming the judgment and decree of the Court below, and the appellee desiring to Petition for Rehearing under Rule 25, does file the following as his Petition and Brief therein.

This Court found "The evidence shows that none of the destroyed articles was in a storage room when destroyed." This action by the court is contrary to the holdings of the Court in that the appellate court has interfered with the findings of the trial court, irrespective of the fact that there is no evidence preponderating against this finding and this court therefore merely substituted its opinion for that of the trial court. The insurance policy makes no designation or gives no definition of what is a "storage room" but uses the plural of the word "room," obviously indicating that the storage room was not to be limited to one specific place.

It is a well established principal of law that insurance contracts are to be considered liberally in insured's favor and strictly against insurer (appellee's Brief, page 21-24). With this as the theory of law we do not understand how this court can define the "storage rooms" as being limited to that upon the second floor only.

The place where 75% of the coats were destroyed was in a room which was used *for no other purpose than*

that of storing furs and though this room or space was not set apart by a door or partition it was clearly defined and separated by an L in the walls formed by the stairway, clearly cleaving the workroom from the mezzanine storage room so that as a matter of fact there was clearly evidence upon which the trial court could substantiate the finding that this was a room. The trial court heard testimony of all witnesses and the only witnesses who testified that this was not a storage room were the representatives of the insurance company who were obviously prejudiced in their opinions and we therefore respectfully submit that this court is in error in disturbing the findings of the trial court.

Irrespective of the court's determination of this finding of fact, the court has failed to make any finding relative to individual floater certificates (72, 74, 75, 94, 306, 308) which were issued by the appellee for and on behalf of the appellant as provided under a rider as evidenced by plaintiff's Exhibit 1 (44-45), for thirteen of the garments that were destroyed in this fire were covered under these floater policies for which the customers paid an additional premium. Each of the policy holders under these individual certificates made proof of claim upon the appellant, which proof of claim was admitted by appellant (25) to be proper and within time. All of these certificate holders were settled with by appellee from whom he took an assign-

ment of all their rights. These policy holders, the amount of their insurance and the reference page wherein this amount is shown is as follows:

Mrs. W. H. Bierman	\$450.00	(72)	
Mr. Victor Belair	350.00	(73)	
Mrs. Gregory Bitter	400.00	(74)	
Irene Bryson	400.00	(76)	(113)
Mrs. George Fortier	225.00	(85)	(114)
Mrs. M. W. Jones	350.00	(92)	
Alice Mary Krause	150.00	(93)	
Mrs. E. E. Leach	250.00	(95)	
Elsie Logozzo	350.00	(95)	
Mrs. Carl Lowenthal	225.00	(96)	
Elaine McCorkindale	350.00	(97)	
Dorothea Stanley—2 coats 2 policies	800.00	(109)	

for a total of \$4,300.00.

It was not necessary for the trial court to determine this question for the court's finding that there was sufficient insurance coverage eliminated a segregation of these individual floater policies. The trial court found (419) in finding No. 8, "That thirteen of the customers who suffered loss in said fire had their furs and garments trimmed with furs covered by certificate endorsements, being special certificate policies covering the amount beyond that as listed under the assured's legal liability. That said customers had paid an additional premium for said additional coverage and had filed with said company due proof of loss. That under a letter dated October 4, 1944, the law firm of Cheney & Hutcheson appearing for and on behalf

of the defendant herein, returned to said customers and policy holders their proof of loss with the notation that settlement would be completed with them." The company by these certificates insured the policy holders and not the appellee herein in the amount of the certificate at any place that said coats might be destroyed and had these said policy holders instituted individual suit for the recovery under said certificate policies they could have recovered each in their own individual amount and would not be under any limitation of any amount that the appellee had herein; and the appellee should therefore be entitled to recover this amount of \$4,300.00, irrespective of the court's finding of a limitation of \$10,000.00 under the terms and conditions of the policy with the appellant company, for the appellee acted as the agent of the appellant, under direct authority from them, for the issuance of these certificates and the fact that the appellee took assignment of these personal claims should not in any way limit the amount of recovery.

Even though this court should affirm the finding that the appellee is limited under the \$10,000.00 provision of the policy it should allow an additional \$4,300.00 to cover the individual insurance written to the policy holders and assigned to appellee.

Or in the event this court should be unable to deter-

mine this question it should be remanded to the trial court for further determination as to these policies.

We, therefore, respectfully submit that the opinion of the trial court is in error in finding that the articles destroyed were not in a storage room and that the court should grant a rehearing herein or affirm the decision of the trial court; and respectfully submit that should the first request be denied that there should be a rehearing upon the question of the allowance of the additional sum of \$4,300.00 to compensate and reimburse the amounts paid to individual holders of certificates from appellant company upon which action was instituted under assignments.

Respectfully submitted,

VELIKANJE & VELIKANJE
E. F. VELIKANJE
E. B. VELIKANJE
S. P. VELIKANJE

Attorneys for Appellee
415 Miller Building
Yakima, Washington



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APPELLANT'S PETITION FOR MODIFICATION OF
DECISION AS TO COSTS AND INTEREST

FILED

APR 25 1947

PAUL P. O'BRIEN,

CLERK

CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON

Attorneys for Appellant

426 Miller Building
Yakima, Washington

APPELLANT'S PETITION FOR MODIFICATION OF DECISION AS TO COSTS AND INTEREST

Appellant, although gratefully cognizant of the fact that the decision of this Court is in its favor on the principal issue herein, respectfully petitions for a modification of the decision herein solely with reference to costs and interest.

1. As to costs, we have now filed a supplemental transcript in this court showing that an offer of judgment, in the sum of \$1800.00, together with interest and costs, was served upon counsel for appellee herein on June 1, 1945, in full compliance with Rule 68 of the Federal Rules of Civil Procedure. The trial did not commence until March 7, 1946. (Tr. 40). The same was served much more than ten days before the trial began.

Rule 68 provides in part:

"If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer, but shall pay costs from that time."

We therefore submit that, having complied with Rule 68 and the offer not having been accepted, appellant is not liable for any costs in the district court subsequent to June 1, 1945, and appellant is entitled to recover from appellee its costs in said court from that time.

2. As to *interest*, the district court held that appellee

was not entitled to recover interest prior to the date of entry of the judgment, saying:

"Now, on the issue of interest, I was under the impression that interest should be charged either from the date of completion of filing of the proof of loss, or at the time within which to bring the suit, but there were, and will, it seems to me, of necessity, be numerous instances here that could not be determined until today. For that reason, I am not going to allow interest from a date other than the one when this judgment is entered." (Tr. 334).

The judgment appealed from was entered on May 14, 1946 and provided "together with interest from date hereof until paid." (Tr. 424).

Appellee did not cross-appeal nor assign error upon this ruling. We therefore submit that upon elementary and well-settled principles appellee is not entitled to recover a more favorable judgment on appeal with reference to interest. Consequently no interest should be recoverable prior to the decision of this Court, or in any event not prior to the said date of entry of judgment in the district court. Interest from the date of the fire, May 9, 1944, should therefore not be allowed.

A further reason therefor is that although the maximum limitation of liability in the sum of \$10,000.00 has at all times seemed to us very clear, we submit that the claim was disputed and unliquidated, and hence under well-settled principles was not subject to interest prior

to judgment, as held in the following and numerous other authorities:

Merchants' Insurance Co. vs. Lilgeomont, (CCA 5)
84 F. (2d) 685, 689;

Stemmer vs. Scottish Union and National Insurance Co.,
33 Ore. 65, 49 Pac. 588, 53 Pac. 498;

Amory vs. Reliance Insurance Co., (Mass.) 94 N. E.
677;

Ferber vs. Wisen, 195 Wash. 603, 82 P. (2d) 139;

Great Northern Railway Co. vs. Washington Electric Co., 197 Wash. 627, 86 P. (2d) 208.

Therefore, without requesting a reargument nor a rehearing of the case as a whole, we respectfully submit that the decision of this Court should now be modified in the two respects hereinabove stated, as to costs in the district court and interest.

Respectfully submitted,
CHENEY, HUTCHESON & GAVIN
ELWOOD HUTCHESON
Attorneys for Appellant

The undersigned, Elwood Hutcheson, hereby certifies that he is one of the attorneys for the appellant herein, that he prepared the foregoing petition, that in his judgment the same is well founded, and that it is not interposed for delay.

ELWOOD HUTCHESON

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHARLES STROM and FLORA STROM,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

SEP 4 - 1940

PAUL P. O'BRIEN,
CLERK

No. 11383

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

L. L. THOMPSON, Esq.,

L. B. DONLEY, Esq.

For Commissioner:

W. H. PAYNE, Esq. [1*]

Docket No. 1798

CHARLES STROM and FLORA STROM,

Husband and Wife,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transferred to Judge Leach 1/23/46

DOCKET ENTRIES

1943

May 24—Petition received and filed. Taxpayer notified. Fee paid.

May 24—Copy of petition served on General Counsel.

May 24—Request for Circuit hearing in Seattle, Wash., filed by taxpayer. 5/25/43 granted.

July 2—Answer filed by General Counsel.

July 6—Copy of answer served on taxpayer, Seattle, Wash.

* Page numbering appearing at top of page of original certified Transcript of Record.

1944

Aug. 31—Hearing set Oct. 30, 1944, at Seattle, Wash.

Oct. 30—Hearing had before Judge Mellott on merits. Stipulation of facts filed. Briefs due 45 days. Replies due 20 days.

Dec. 8—Brief filed by taxpayer. 12/14/44 Copy served.

Dec. 13—Brief filed by General Counsel. Served 12/14/44.

1945

Jan. 17—Transcript of hearing Oct. 30, 1944 filed.

1946

Mar. 29—Findings of fact and opinion rendered, Judge Leech. Decision will be entered for the respondent. Served 4/1/46.

Mar. 29—Decision entered, Judge Leech, Div. 6.

June 17—Stipulation as to venue filed.

June 17—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

June 17—Proof of service filed by taxpayer.

June 17—Praecipe for record filed by taxpayer with proof of service thereon.

June 17—Agreed statement of evidence filed.

The Tax Court of the United States

Docket No. 1798

CHARLES STROM and FLORA STROM,
Husband and Wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:90D:GLB, dated March 9, 1943, and as a basis of their proceeding allege as follows:

1. The petitioners, during all of the times mentioned herein, were and are husband and wife and during all of said times were residents of the town of Taholah, in the state of Washington, which town is situated within the boundaries of the Quinaielt Indian Reservation. No return was filed by petitioners for the period here involved with the Collector for the District of Washington for the reason that the petitioners contend that, under the appropriate tax laws of the United States, they were not required to file an income tax return or pay any tax upon the income here in controversy.

2. The Notice of Deficiency (a copy of which is attached and marked "Exhibit A"), was mailed to the petitioners on March 9, 1943.

3. The taxes in controversy are income taxes for the calendar [2] year 1941 and in the amount of \$169.67.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The refusal of the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge, at Seattle, Washington, to hold that the income of petitioners, referred to in said Notice of Deficiency, is exempt from the imposition of income taxes by the United States under the statutes of the United States, the Constitution of the United States and the provisions of the Indian Treaty of July 1, 1855, between the Quinaielt Tribe and other Indian tribes and the United States (12 St. L. 971), which treaty was ratified by the United States on March 8, 1859.

(b) The refusal of the Commissioner of Internal Revenue, acting through the Internal Revenue Agent in Charge at Seattle, as aforesaid, to hold that, in any event, the Government of the United States and the Commissioner of Internal Revenue are not estopped from seeking to collect from petitioners an income tax upon their 1941 net income by reason of the facts and circumstances hereafter alleged.

(c) The refusal of the Commissioner of Internal Revenue, acting through said Internal Revenue Agent in Charge at Seattle, to hold that, in any event, the Government of the United States and the Commissioner are not [3] bound by long and con-

tinuous executive construction and interpretation to construe and interpret the general income tax laws applicable to the taxation of the net income of the citizens of the United States for the calendar year 1941 as not intended to include as subject to the imposition of said income tax, the income here involved.

(d) In imposing upon petitioners a penalty of \$42.42 on account of their failure to file an income tax return for said calendar year.

5. The facts upon which petitioners rely as a basis for this proceeding are:

(a) Petitioners, during their entire lives were, and now are, members of the Quinaielt tribe and during all of the said times resided within the boundaries of the Quinaielt Indian Reservation on the northwestern shores of the State of Washington, which Indian Reservation was created under said treaty of July 1, 1855, heretofore referred to, and are direct descendants of the members of said Quinaielt tribe, the representatives of which entered into said treaty with the United States. Petitioners at all times mentioned herein were, and now are, wards of the Government of the United States under applicable provisions of the statutes of the United States relating to Indian peoples who have remained under the jurisdiction of the Office of Indian Affairs of the Department of the Interior of the [4] United States. The entire net income of petitioners, referred to in said Notice of Deficiency, and amounting to \$3,316.70, was income which accrued to peti-

tioners from the sale by petitioners of food fish caught by the petitioner, Charles Strom, in the waters of the Quinaielt River, which river flows through said Quinaielt Indian Reservation and is within the boundaries thereof. Previous to the making of said treaty the ancestors of petitioners, who constitute the Quinaielt Indian tribe, were the owners as a sovereign entity, of a considerable area of timber lands bordering upon the Pacific Ocean and situated generally in the northwestern portion of the State of Washington and which area included the lands now located within the boundaries of the Quinaielt Indian Reservation. Said areas were not then, and are not now, suitable or adapted to agriculture and from time immemorial petitioners' ancestors and the petitioners have depended to a very substantial extent for their subsistence upon the taking of food fish from the waters of said area, particularly from the waters of the Quinaielt River which, from time immemorial, has been known as a river frequented at intervals by salmon of the finest species. Pursuant to the terms of said treaty, the then President of the United States, by executive order dated November 7, 1873, set aside for the perpetual use of the members of the Quinaielt tribe, the area now included in the Quinaielt Indian Reservation, through which [5] area flows the Quinaielt River and from the waters of which the petitioner, Charles Strom, caught the fish which produced the income now sought to be taxed by the respondent. Said fishing waters have never been allocated by the Government of the United States to the specific use of any par-

ticular members of the Quinaielt tribe but, pursuant to proper rules and regulations of the Office of Indian Affairs of the Department of the Interior of the United States, the tribal council of the Quinaielt tribe has been permitted to, and has, allocated certain fishing locations upon said Quinaielt River to the various members of the tribe, at which allocations fish is caught by the use of nets and other fixed appliances by the members of the tribe. Title to said fishing allocations has, however, been regarded both by the Government and by the tribe as vested in the tribe as an entity, subject to such allocations as might be made by the tribal council of the tribe and approved by the Indian Agent in Charge. The fish heretofore referred to, and from the sale of which petitioners' 1941 net income referred to in the Notice of Deficiency was received, was caught by the petitioner, Charles Strom, at a place assigned to his use by said tribal action. The purpose and intent of said treaty and the creation of said Indian Reservation thereunder was to allocate to the members of the Quinaielt tribe all fishing rights in said Reservation, to the end that the members of said tribe might not [6] become objects of public charity and to make them self-supporting. That, in fact and in law, said fish were and are capital assets of the members of said Indian tribe set aside to them by the joint action of the United States and the representatives of the tribe for their perpetual use and support.

Since the creation of said Indian Reservation the taking of fish for commercial purposes within the

boundaries of said reservation by persons other than the members of the Quinaielt tribe has at all times been prohibited by the Government of the United States. The taking of fish for personal consumption by other than the members of the tribe has been permitted by the Government to a limited degree but pursuant to the rules and regulations promulgated by said Office of Indian Affairs. The Government of the United States at all times has insisted that it has full power to either regulate or prohibit the taking of fish within the boundaries of said reservation by such persons, anything in the laws of the State of Washington to the contrary notwithstanding.

That by reason of the facts and circumstances herein set forth, petitioners assert that the Act of Congress did not require the payment of income taxes upon moneys received by petitioners from the sale of fish caught in the waters and under the circumstances [7] aforesaid and that if said statutes be construed as seeking to impose such tax then they are in violation of the Constitution of the United States.

(b) In the alternative, and in the event that the court should hold that said income is subject to the imposition of income taxes, then petitioners allege that the respondent is now estopped from collecting from the petitioners income taxes imposed upon income for 1941 or prior years. This contention is based upon the following facts: For a period of many years previous to the year 1942 the Commissioner of Internal Revenue of the United States and

his predecessors in office, in many official and non-official opinions to which respondent has access, has ruled that income of this nature was not subject to the imposition of income taxes under the laws of the United States. This ruling, for many years, was communicated to the various Indian agents appointed by the Office of Indian Affairs to supervise the affairs of the Indian tribes, including the Quinaielt tribe, and to advise with them concerning their relations with the Government of the United States. That previous to the year 1942 and the imposition of the tax here in question, neither petitioners or the other members of the Quinaielt tribe were ever advised that the Commissioner of Internal Revenue had reversed his position or that the members [8] of said tribe would be required to file income tax returns and pay taxes under the income tax laws; that, acting and relying upon said uniform construction of the tax laws by the Commissioner of Internal Revenue, petitioners and the other members of the tribe made no provisions for the payment of any taxes upon income received in 1941 and prior years; that the year 1942 was a poor fishing year and the members of the tribe, including petitioners, received a very reduced income from fishing operations and that they have insufficient funds available for the payment of said taxes and that if compelled to pay them they will have to be supported by the Government of the United States; that the Government of the United States, by reason of the acts and conduct of the Commissioner of Internal Revenue, as aforesaid, should now be held to be estopped from seek-

ing to collect taxes upon income of this nature received by petitioners in 1941 and prior years.

(c) In the alternative, and in the event that the court should refuse to hold with petitioners upon the contentions made in the preceding paragraphs of this petition, then it is contended that, in any event, the respondent, both in equity and in law, had no right to impose upon petitioners a penalty of \$42.42 for failing to file a return for the year 1941. The facts and circumstances upon which petitioners rely in support of this contention are set forth in the preceding sub-paragraph [9] of this petition, which is made a part hereof by reference.

Wherefore, petitioners pray that this court may hear this proceeding and on such hearing may determine that there is no tax due from petitioners for the year 1941, and in the alternative and in any event, that there is no penalty due from petitioners for failing to file a tax return for said year, and for such other and further relief as to the court may seem just and equitable.

L. L. THOMPSON,

L. B. DONLEY,

Counsel for Petitioners.

State of Washington,

County of Grays Harbor—ss.

Charles Strom and Flora Strom, each being first duly sworn on oath, say: That they are the petitioners above named; that they have read the foregoing petition and are familiar with the statements

contained therein and that the statements contained therein are true.

CHARLES STROM,
FLORA STROM.

Subscribed and sworn to before me this 10th day of May, 1943.

[Seal] FRANK W. LAW,
Notary Public in and for the State of Washington,
residing at Taholah, Wn. [10]

EXHIBIT A

Treasury Department
Internal Revenue Service

Seattle, Washington, March 9, 1943

Office of Internal Revenue Agent in Charges, Seattle
Division, 350 Federal Office Building.

IT:90D:GLB

Mr. Charles Strom and Mrs. Flora Strom, Husband
and Wife, Taholah, Washington.

Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1941, discloses a deficiency of \$169.67 and \$42.42 in penalty as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal

holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Seattle, Washington, for the attention of IT:90D:GLB. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing this form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By /s/ S. R. STOCKTON,
Internal Revenue Agent in
Charge.

Enclosures: Statement; Form of waiver. GLB:sm

STATEMENT

IT:90D:GLB

Mr. Charles Strom and Mrs. Flora Strom, Husband
and Wife, Taholah, Washington.

Tax Liability for the Taxable Year ended December 31, 1941:

	Liability	Assessed	Deficiency	Penalty
Income tax	\$169.67	\$ None	\$169.67	\$ 42.42

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated September 8, 1942, and revised statement dated February 19, 1943; to your protest dated October 28, 1942; and to the statements made at the conferences held on November 13, 1942, and February 15, 1943.

Inasmuch as you failed to file a return within the time prescribed by law, 25 per centum of the tax has been added thereto in accordance with section 3612(d)(1) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, L. B. Donley, Finch Building, Aberdeen, Washington, in accordance with the authority contained in the power of attorney executed by you.

Net Income

It has been determined that you received taxable net income during the year 1941 in the amount of \$3,316.70.

The computation of taxable net income is as follows:

Gross income from sales of salmon.....	\$5,917.29	
Less: Wages, spring run of salmon.....	\$1,754.52	
Wages, fall run of salmon.....	326.87	
Expenses	369.20	
Truck expense	150.00	2,600.59
		<hr/>
Net income.....		\$3,316.70

Computation of Tax

Net income adjusted	\$3,316.70
Less: Personal exemption	1,500.00
<hr/>	
Balance (surtax net income).....	\$1,816.70
Less: Earned income credit—10% of \$3,000.00.....	300.00
<hr/>	
Net income subject to normal tax.....	\$1,516.70
Normal tax at 4% on \$1,516.70.....	\$ 60.67
Surtax on 1,816.70.....	109.00
<hr/>	
Corrected income tax liability.....	\$ 169.67
Income tax assessed:	
Original, Account No.—(no return filed).....	none
Deficiency of income tax	\$ 169.67

[Endorsed]: T.C.U.S. Filed May 24, 1943. [13]

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits that the petitioners are husband and wife, residing in the town Taholah, in the State of Washington. Admits that no return was filed by petitioners, for the period here involved, with the Collector of Internal Revenue for the District of Washington. Denies the remaining allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are in-

come taxes for the calendar year 1941. Respondent alleges that in addition to the deficiency in income tax asserted for the said year 1941, he also determined a deficiency in penalty for that year in the amount of \$42.42, as is shown by the deficiency notice, a copy of which is attached to the petition. [14]

4 (a) to (d), inclusive. Denies that in determining the deficiencies in tax and penalty as set forth in the deficiency notice, the respondent committed any of the errors alleged in subparagraphs (a) to (d), inclusive, of paragraph 4 of the petition.

5 (a) to (c), inclusive. Denies each and every material allegation contained in subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition herein, not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's determination of deficiencies be approved.

/s/ J. P. WENCHEL, WHP

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel,

B. H. NEBLETT,

WILFORD H. PAYNE,

Special Attorneys, Bureau of
Internal Revenue.

[Endorsed]: T.C.U.S. Filed July 2, 1943. [15]

[Title of Tax Court and Cause.]

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that the following facts are true and may be considered by the court as evidence in this proceeding:

1. Petitioners, Charles Strom and Flora Strom, during the taxable year 1941, were and for many years last past have been husband and wife residing together as such in the town or Indian village of Taholah, Grays Harbor County, State of Washington, which town is situated wholly within boundaries of the Quinaielt Indian Reservation. The Quinaielt Indian Reservation is an Indian reservation located, lying and being wholly within Grays Harbor and Jefferson Counties, Washington. The boundaries thereof are correctly shown in the attached map of the Olympic Peninsula of the State of Washington which said map is marked as Joint Exhibit 1-A [16] and made a part hereof. No Federal tax returns have been filed by petitioners for the taxable year 1941.

2. The petitioner Charles Strom is an Indian of full blood of the age of fifty-four (54) years, and was born at LaPush, Washington. He is a member of the Quinaielt Indian tribe and has resided on the Quinaielt Indian Reservation at Taholah, Washington, for a total of about forty-four (44) years. Petitioner Flora Strom is $\frac{1}{4}$ degree Quinaielt Indian.

3. The Quinaielt Indian Reservation has as its Westerly boundary the Pacific Ocean. The Quinault River flows from Lake Quinault on the Easterly end of said reservation in a Westerly direction, emptying into the Pacific Ocean at the said village or town of Taholah, Washington. During the spring and fall seasons there are runs of fish up the said river and to the said lake. From time immemorial the Quinaielt Indians and allied tribes have taken fish from the said Quinault River for their own use and, in later years, for sale.

4. For many years prior to 1911 pursuant to the Tribal customs and practices of the Quinaielt Indian tribe certain Indians were allotted by the Tribal leaders, the exclusive right of taking fish from certain areas on the Quinault River and in the lower or Western fifteen (15) miles thereof. About the year 1911, or subsequently, the Department of Interior of the United States of America, acting [17] by and through the United States Indian Service, began allocating to certain Indians, in accordance with said Tribal custom and usage, certain exclusive locations for the taking of fish from the said river. On April 9, 1919, E. B. Meritt, Assistant Commissioner of the Office of Indian Affairs of the United States of America promulgated certain regulations for governing fishing on the Quinault River. A full, true and correct copy of said regulation is hereto attached and marked as Joint Exhibit 2-B and made a part hereof.

5. Since the date of the decision of the United

States District Court for the Western District of Washington, Southern Division, rendered in the year 1925 in the case of *Mason v. Sams*, reported at 5 Fed. (2d) 255, the Indians on the Quinaielt Reservation have established their own regulations governing fishing operations in the various streams and lakes thereon, which practices have since been conducted without any Federal, State or administrative interference or supervision outside the tribe. Thereafter the sole control and government of fishing rights and practices on the Reservation has been under the direction of the Quinaielt Indian tribe acting by and through its Tribal Council.

6. The Quinaielt Indian Tribal Council thereafter adopted the aforesaid regulations, Joint Exhibit No. 2-B, in their entirety save and except from time to time the same have been amended in matters relative to the fishing seasons and the gear to be used. In all [18] other material respects said regulations have been and are enforced by the Quinaielt Indian tribe acting by and through its Tribal Council with the aid of what is known as the Channel Police of said tribe.

7. Pursuant to said rules, regulations, Tribal customs, usages, orders and regulations adopted by the said Tribal Council, certain but not all of the chartered fishing locations on the Quinault River have been, during the year 1941, and now are allotted and assigned for the use of certain individual members of the said tribe. There is attached hereto marked as Joint Exhibit 3-C and made a part hereof a blueprint made in 1932 showing the locations of seventy-

eight (78) of such fishing locations, as they existed in 1916. For many years last past, and during the year 1941, Charles Strom and his wife have been recognized as having the exclusive right to use and to take fish during proper seasons and with proper gear from location No. 7 as shown on the said blueprint. Said fishing location No. 7 at all times since the creation of said reservation has remained as common Tribal property not allocated, and is subject only to the rights of use granted by the Tribal Council to the said Charles Strom and wife.

8. Said fishing locations are on both sides of the Quinault River and each is 255 feet in length. There are similar fishing locations within said reservation on the Queets River (see Joint [19] Exhibit No. 1-A) which said fishing locations are also governed by the similar Tribal regulations. The size of locations, gear usable, and fishing seasons on the Queets River, however, differ from those pertaining to the Quinault River.

9. The matter of allocation of these several fishing locations were, in the beginning, based upon Tribal members taking over certain grounds which were recognized as being exclusive locations of such Tribal members. Under Tribal rules, regulations, and customs, and the orders of the Tribal Council, such fishing locations may be assigned to other persons or may pass, upon death of a holder of such a location, to his family, with the limitation, however, that such fishing locations may only be assigned or passed to members of the tribe who maintain a home

upon the reservation. Such fishing location must be fished at least once each year in a businesslike manner, failing which such locations are deemed by Tribal custom to have been abandoned.

10. Under Tribal rules, regulations and customs, fish taken from such locations may be sold only to persons licensed as Indian traders. Licenses to Indian traders are issued by the Indian Agency subject to the approval of the Tribal Council of said tribe. After purchasing fish the Indian traders are at liberty to dispose of them in any manner they deem advisable, either on or off the reservation and at such market as they may desire. [20]

11. During the year 1941 the Mohawk Packing Company of Moclips, Washington, was issued an Indian fish buyers license and during that year bought fish taken from such locations through their agent, Cleveland Jackson, who then was and now is a member of the Quinaielt tribe residing on said reservation. The Mohawk Packing Company has a plant located at Moclips, Washington, which is located near to but is not located upon said reservation. The Mohawk Packing Company is an independent organization and is managed and controlled by one Victor Borden who is not an Indian or a member of any Indian tribe.

12. During the year 1941, by oral agreement with Cleveland Jackson acting for and in behalf of said Mohawk Packing Company, the petitioners, Charles Strom and wife, sold and disposed of fish caught by them in their fishing location No. 7 to the said Mo-

hawk Packing Company. Said oral agreement was not exclusive, however, and petitioners were under no legal obligation to sell their fish to the said Mohawk Packing Company. They did actually sell their fish, during the 1941 fishing season, to the Mohawk Packing Company which fish were bought by the said Cleveland Jackson at the going market price.

13. During the taxable year 1941 petitioners realized income from fishing operations from fishing location No. 7 on the Quinault River which they were permitted to use as follows: [21]

Gross income from sales of fish to Mohawk Packing Company	\$5,917.29	
Less: Wages paid others for assistance in connection with the spring run of salmon	\$1,754.52	
Wages to others for assistance in handling the fall run of salmon.....	326.87	
Miscellaneous expenses	369.20	
Truck expenses	150.00	2,600.59
		<hr/>
Net income realized during the taxable year.....	\$3,316.70	

In his deficiency notice respondent determined that petitioners are subject to tax on the net income derived by them from fishing operations as shown above and computed an income tax thereon in the amount of \$169.67, the details of which are fully set out in the notice of deficiency, a copy of which is attached to the petition. In addition to said deficiency respondent also asserted a 25 percent penalty thereon in the amount of \$42.42 for failure to file a return as required by law. On the basis of the facts developed and established since the

deficiency notice was issued respondent now specifically waives the amount of penalty previously asserted and makes claim only to the deficiency in tax determined in the notice of deficiency.

14. The treaty by and between the United States of America and the Quinaielt and other allied Indian tribes was entered into on July 1, 1855. A full, true and correct copy of said Treaty is hereto attached marked Joint Exhibit No. 4-D and made a part hereof. [22] No further or different treaty by and between the United States of America and said Indian tribes has ever been entered into or consummated.

15. On November 4, 1873 the President of the United States, by executive order, created the Quinaielt reserve or Indian Reservation. A full, true and correct copy of such executive order, is hereto attached and marked Joint Exhibit No. 5-E and made a part hereof. At all times since said reservation, as shown on Joint Exhibit No. 1-A, has been and now is the reservation of the Indians covered by said treaty and by such executive order.

16. Prior to the year 1941 substantially all of said reservation lands and the timber growing thereon, were allotted to various members of said tribes. There is attached hereto marked Joint Exhibit 6-F and made a part hereof a copy of the official map of the said Indian Reservation lands showing the allotment numbers thereon.

17. Neither Charles Strom nor Flora Strom have ever received certificates of competency and at all

times herein mentioned were and now are considered by the Office of Indian Affairs of the United States of America as incompetent wards of the Federal Government. By act of Congress of June 2, 1924 (43 Stat. at Large, 1923-1924, Part I p. 253 c. 233) they were and are citizens of the United States [23] of America. The said Charles Strom has been allotted on the Quinaielt Reservation allotment No. 427 described as:

Lot 1 and the Northeast Quarter of the Northwest Quarter of Section 30, Township 23 North, Range 10, W. W. M. in Grays Harbor County, Washington, consisting of 86.20 acres,

and trust patent therefor was issued to the said Charles Strom on September 29, 1926. Flora Strom is the holder of allotment No. 322 on the Quinaielt Reservation consisting of the:

West One-half of the Southeast Quarter of Section 14, Township 23 North, Range 11, W. W. M. in Grays Harbor County, Washington, consisting of 80 acres,

and trust patent to her, covering said allotment, was issued on September 29, 1926. Said allotments No. 427 and No. 322 are shown on Joint Exhibit No. 6-F hereto attached and made a part hereof.

18. The monies received by petitioners from fishing operations, during the year 1941, were not taken under control by the Indian Service of the United States of America nor by any of its officials. Said petitioners had the full and unrestricted right

and privilege of expending such funds as they saw fit without any supervision whatever by the officials of said Indian Agency or any other officials of the United States of America.

19. There are at present approximately 948 Indians who have Tribal rights in the various tribes to which the Quinaielt Indian Reservation has been allocated, residing outside of the reservation. [24] Approximately 924 Indians who have such Tribal rights reside upon said reservation, according to the records of the office of the United States Indian Service and the office of the Superintendent thereof at Hoquiam, Washington. Substantially this same number existed in the year 1941 and the proportion living on and off the reservation was approximately the same.

20. The Quinaielt Indian Reservation is largely timbered. It is not adapted to grazing or to farming. Only about $\frac{1}{2}$ of 1 percent of the Indians engage in grazing or farming operations on said reservation. Most of the members of said tribe who reside upon the reservation live in the Indian village at Taholah. The Quinaielt and allied tribes residing on said reservation are known as "fish-eating Indians," and the principal means of livelihood of said Indians, since time immemorial, has been principally fishing and hunting. The present living members of said tribe are the descendants of the Indian tribes with whom the Treaty of July 1, 1855 was made.

21. It is further agreed and understood that

either party may offer at the hearing other or further evidence on the issue presented not inconsistent with the facts stipulated herein.

/s/ L. B. DONLEY,
Counsel for Petitioners.

/s/ L. L. THOMPSON,
Counsel for Petitioners.

/s/ J. P. WENCHEL, W. H. P.
Chief Counsel
Bureau of Internal Revenue
Counsel for Respondent.

[Endorsed]: T. C. U. S. Filed Oct. 30, 1944.

[Title of Tax Court and Cause]

Promulgated March 29, 1946.

Petitioners, restricted Indians residing on the Quinalt Reservation in Washington and operating a commercial fishing business on the Quinalt River on that reservation, where the unrestricted right of fishing by such Indians is guaranteed by treaty with the United States, are liable for tax upon income they received for their free and untrammelled use from the exercise of such right.

L. L. Thompson, Esq., and L. B. Donley, Esq., for the petitioners.

W. H. Payne, Esq., for the respondent.

Respondent determined a deficiency in income tax of \$169.67 for the calendar year 1941. The issue is whether restricted members of the Quinalt tribe of Indians living on the Quinalt Reservation

are subject to Federal income tax on income derived from the selling of fish caught by them in the Quinaielt River on that reservation. A 25 per cent [39] penalty originally asserted by respondent for failure to file a return is now waived. Substantially all the facts are stipulated and are so found. The facts hereinafter found in addition to those stipulated were established by oral testimony at the hearing.

FINDINGS OF FACT

Petitioners, husband and wife, are restricted members of the Quinaielt tribe of Indians and reside at the Indian village of Taholah, Grays Harbor County, Washington, which is on the Quinaielt Indian Reservation. By Act of Congress of June 2, 1924 (43 Stat. at Large, 1923-1924, Part I, p. 253), they are citizens of the United States. They filed no income tax returns for the year 1941.

The date of the treaty between the United States and the Quinaielt and certain other Indian tribes was July 1, 1855. By this treaty the lands of these tribes running from the Cascade Mountains to the Pacific Ocean were ceded to the United States. Article 2 of such treaty provides:

Article 2. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the

tribe and of the superintendent of Indian affairs or Indian agent. And the said tribe bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

On November 4, 1873, the President of the United States, in carrying out the provision of this treaty to set apart a permanent reservation, [40] issued an executive order setting aside a permanent Indian reservation. The western boundary of the tract of land so set aside is the Pacific Ocean. At its eastern extremity and within the reservation is Quinaielt Lake. From this lake the Quinaelt River flows through the reservation, emptying into the Pacific in the Indian village of Taholah. Twice each year there is a run of salmon from the sea up the river to spawn in the lake. These runs of fish vary with the years. In only an occasional year is there a run which justifies commercial fishing.

The Indians fish with gill nets set in the river. These are quite expensive and their deterioration is very rapid. The fishing is done at certain fixed and chartered locations on the river. Each location is 255 feet long. These are allotted periodically to

certain members of the tribe by the Tribal Council and the income from the use of such locations is that of the allottee and not the communal income of the tribe. In the year 1941 the petitioners were allotted and used location No. 7. Since the creation of the reservation, this location has at all times remained as common tribal property. The allocation of these locations to members of the tribe is solely by action of the Tribal Council and their assignment by the holder, or their passing to a member of his family upon his death, is controlled by the tribal rules, regulations and customs and the orders of the Tribal Council.

Under rules and regulations adopted by the Tribal Council, the periods, manner and method of the fishing, together with the type of fishing gear to be used, are regulated. These rules and regulations further provide that any fish caught may be sold only to an approved Indian trader. These traders are issued licenses by the Indian Agency subject to the approval of the Tribal Council.

Certain of the fishing locations on the river are much better than [41] others. On the best location, in a year of the largest run of fish, it is possible for the holder of the location to make a year's catch which will sell for as much as \$10,000 gross. The expense, however, in connection with the fishing is a substantial amount.

Prior to 1922 no attempt was made by the Federal government to tax the income derived by the Quinaielt Indians from the fishing operations on the reservation. In that year these Indians were notified to file income tax returns and several of

them did so. Later, presumably as a result of an opinion by the Attorney General, 34 Ops. Att'y Gen. 275, holding income of the Five Civilized Tribes exempt from Federal income tax, no further effort was made to collect such taxes until the year 1941 and the determination of the deficiency here involved.

During the year 1941, the Mohawk Packing Company of Moclips, Washington, held an Indian trader's license authorizing it to buy fish caught on the Quinaielt reservation and made purchases through their agent, Cleveland Jackson, who was a member of the Quinaielt tribe residing on such reservation. During the year 1941 the petitioners, by oral agreement with Cleveland Jackson, sold to the Mohawk Packing Company fish caught by them at fishing location No. 7. During that year petitioners realized income from their fishing operations at location No. 7, as follows:

Gross income from sales of fish to Mohawk Packing Company	\$5,917.29
Less: Wages paid others for assistance in connection with the spring run of salmon	\$1,754.52
Wages to others for assistance in handling the fall run of salmon....	326.87
Miscellaneous expenses	369.20
Truck expenses	150.00
	<hr/>
Net income realized during the taxable year.....	\$3,316.70

[43] Neither the petitioner, Charles Strom, nor the petitioner, Flora Strom, has ever received certificates of competency and at all times herein mentioned were, and now are, considered by the Office

of Indian Affairs of the United States of America as incompetent wards of the Federal government. The petitioner, Charles Strom, has been allotted 86.20 acres of the reservation, this being allotment No. 427. Flora Strom is the holder of allotment No. 322 on the reservation, consisting of 80 acres. The Quinaielt Indian Reservation is heavily timbered and is not adaptable to agricultural development. The Quinaielt and other tribes occupying the reservation are what are known as fish-eating Indians who, for many generations, have existed from their hunting and fishing operations. The income derived by the petitioners from their fishing operations in 1941, as hereinabove described, was not received by the Indian Office but was received by the petitioners as their property, free to use in any way they saw fit.

OPINION.

Leech, Judge: This case presents a novel question not heretofore decided by the courts. May the Federal government tax income realized by an Indian who has not received a certificate of competency and is, accordingly, an incompetent ward of the government, when such income is derived by him from the exercise, on common unallotted tribal property, of a tribal right guaranteed by a treaty?

Petitioners contend that the imposition of a tax on income derived from fishing operations on the reservation constitutes a denial of the free and unrestricted right to fish guaranteed to them by treaty. It is urged that, although the treaty makes

no mention of taxation and there is no expressed exemption, the accepted rule is that such treaties are to be [43] liberally construed for the protection of the Indian and the maintenance of his rights thereunder as he understood them to be. It is argued that in view of the conditions under which the treaty was executed and the fact that, since time immemorial, these particular Indians were dependent upon their fishing operations for their support and maintenance, a fair and just construction of the guarantee of their fishing rights without interference is that it carried the meaning to them, in the execution of the treaty and the surrender of their lands, that on the reservation set aside they alone would be permitted to fish and to do so without burden or restriction of any character. It is argued that the understanding of the Indian in executing the treaty was that as to their fishing on the reservation the Federal government was precluded from taking from them any portion of the fish they caught or the proceeds of the sale or barter of such fish in securing for themselves those things necessary for their support and maintenance.

Respondent emphasizes that since the Quinaielt treaty provides for no immunity from taxation, such immunity may not be implied. He takes the position that the income in question thus comes clearly within the definition of section 22 (a), I. R. C., that obviously it does not fall within any one of the exclusions of subsection (b), and that it is therefore taxable under section 11, I. R. C., which

imposes the tax on such income of "every individual." He points out that petitioners, although Indian wards of the government, are citizens and enjoy the protection and rights of such citizenship, and that accordingly no injustice is done to wards by the Federal government in requiring them to bear their proportionate share as citizens of the general burden of taxation. [44]

The fishing rights guaranteed under Article 2 of the treaty, as set out in our findings, and similar rights guaranteed in the same language under treaties with other tribes, have been before the courts in several cases. In none of them, however, was the present question involved. Those cases involved attempts by the State or Federal governments to restrict, curtail or regulate fishing privileges specifically reserved to the Indians by treaty. The decisions there apply to the question here only to the extent that they establish that fishing rights guaranteed by treaty are the property of the Indians, that neither the State nor Federal government may, by statute, deny their exercise, and that in construing the treaties their provisions must be given effect in accordance with the understanding of the Indians when such treaties were made. *Tulee v. Washington*, 315 U. S. 681; *Seufert Bros. Co. v. United States*, 249 U. S. 194; *United States v. Winans*, 198 U. S. 371.

In *Mason v. Sams*, 5 Fed. (2d) 255, the treaty here pertinent was before the court in connection with the determination of the character of the rights possession by the Indians to fish on the reservation

in the Quinaielt River. The Commissioner of Indian Affairs, in the exercise of his statutory authority to make rules and regulations respecting the restricted Indians, had promulgated certain regulations specifying the times and manner in which fishing should be done and prohibiting the use of nets such as the Indians used. Such regulations further provided that the fish caught should be sold only to a buyer licensed by the government, that payments for the fish were to be made to the Indian Agent and that an amount be withheld therefrom ranging from five per cent on any amount from \$500 to \$1,000 to 25 per cent on amounts in excess of \$3,000. The money so withheld was to be remitted to [45] the Bureau of Indian Affairs to be used by it for the care of the aged and indigent members of the tribe or for other purposes incidental to the maintenance of the Indian Agency. In this case the court held that the Indians possessed the right to fish without any regulation or control by the Federal government, either over their fishing operations or the proceeds from the sale of the fish they caught.

There is no doubt, we think, that prior to the decisions by the Supreme Court in *Choteau v. Burnet*, 283 U. S. 691, and *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U. S. 418, the administrative interpretation of the revenue acts in the light of various Indian treaties was that the income derived by restricted Indian wards from tribal or allotted Indian lands was exempt from tax. 34 Ops. Att'y Gen. 275; 34 Ops. Att'y Gen.

302; 34 Ops. Att'y Gen. 439; 35 Ops. Att'y Gen. 1; 35 Ops. Att'y Gen. 107. This conclusion is supported by the fact that, with one exception, no attempt was made over a long period of years to tax the income derived by these petitioners and other Indians from fishing operations on the Quinaialet River. This one exception was that in 1922 the Indians were directed to file income tax returns although such direction was later withdrawn.

In *Choteau v. Burnet*, supra, the petitioner was a member of the Osage tribe of Indians holding a certificate of competency. He was held taxable upon his proportionate share of the tribal income from oil and gas leases made by the tribe on lands purchased for it by the United States with money belonging to the tribe and held in trust for it. The court there said:

The language of sections 210 and 211 (a) subjects the income of "every individual" to tax. Section 213 (a) includes income "from any source whatever." The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does.

In reaching its conclusions in this case the court pointed to the fact that the income sought to be taxed was in the "untrammelled ownership" of the petitioner and that his power to use it was absolute. Accordingly the claim that petitioner was to

be considered restricted as to this income and therefore exempt from tax thereon was denied. In *Superintendent of Five Civilized Tribes v. Commissioner*, *supra*, the court held that income received by a Creek Indian, without limitation on its use, derived from the investment of funds arising from restricted lands, was subject to Federal income tax in the hands of the Indian notwithstanding that the Indian was a ward of the United States. The court emphasized that the taxing provisions of the several revenue acts are broad and that nothing therein indicates that Indians are to be excepted. It relied particularly on the facts that there was no agreement with the Creeks or any Act of Congress dealing with their affairs which expressed a definite intent to exclude such income from taxation.

In *A. M. Landman, Superintendent of the Five Civilized Tribes*, 42 B. T. A. 958; *affd.*, 123 Fed. (2d) 787; *cert. den.*, 315 U. S. 810, we had the question of whether the estate of a restricted full blooded Creek Indian was subject to Federal estate tax. It was contended that the understanding of the Indian was that his land should be non-taxable; that this embraced every form of taxation and that the understanding of the Indian must be given effect. [47] In that case we said:

Apparently all of these arguments were pressed upon the United States Supreme Court in the case of *Superintendent of the Five Civilized Tribes v. Commissioner* 295 U. S. 418. The Supreme Court rejected the contentions in holding that the income

of a trust fund held for a restricted Indian was subject to income tax. The Supreme Court said:

Nor can be conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. *Choate v. Trapp*, 224 U. S. 665. The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden.

The petitioner contends that the above cited case is not in point in this proceeding for the reason that the Court was there dealing only with income derived from the investment of surplus funds of a restricted Indian and not with income derived from royalties on oil produced from the Indian's land. It is apparent, however, from the rationale of the opinion and from the cases cited, that the court intended to make no distinction between a restricted Indian's income derived from the investment of surplus funds and his other taxable income. The point was made that "The language of sections 210 and 211 (a) [Revenue Act of 1918] subjects the income of 'every individual' to tax." Therefore the income of the restricted Indian is subject to tax the same as the income of an unrestricted Indian or any other citizen or resident. * * *

In affirming our decision in this case, the court said:

Likewise in *Choteau v. Burnet*, *supra*, the court refused to extend immunity from a tax sought to

be imposed by the national government upon income of a restricted Indian, although such income was derived from his share of a departmental oil and gas lease, the proceeds of which were held by the Superintendent as tribal trust funds until they were disbursed to the restricted Indian. The court held that after the funds were paid over to the unrestricted Indian, they no longer retained a restricted character and the recipient thereof was not entitled to tax immunity thereon.

In *Superintendent v. Commissioner*, *supra*, the court denied the claimed exemption from income tax (Revenue Act of 1928, Sec. 11 and 12, 26 U. S. C. A. Int. Rev. Acts, page 352) on income derived from the restricted allotment of a fullblooded Creek Indian held by the United States in trust for him under the direction of the Superintendent. The court found nothing in the treaties, agreements, and acts of [48] Congress, upon which the Superintendent now relies, which would justify exclusion [sic] from taxation the income derived from the restricted land, concluding that "the taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden." The court made a clear distinction between a tax levied upon land as such, and the income derived therefrom.

The question here is different from that presented in the last three cited cases in that the income presently involved was derived personally by a restricted Indian in his exercise of a right guar-

anted to him by treaty. The principles laid down in the cited cases would appear to apply with equal force to the instant situation and deny the exemption. There is here no express exemption from tax in the treaty with the Quinaielt Indian tribe. The income which respondent seeks to tax is in the "untrammelled possession" of the petitioners with no restriction upon its use by them. We do not agree with the argument that the imposition of the tax upon income earned by these petitioners in carrying on a commercial fishing business on the Quinaielt River is a restriction upon the right to fish guaranteed by the treaty. The Quinaielt Indians on the reservation were as free to fish in the Quinaielt River after the imposition of an income tax as they were prior to that time. The disputed income tax is not a burden upon the right to fish but upon the income earned through the exercise of that right.

Likewise we do not agree with the position of petitioners that in the making of the treaty the understanding of the Indian of its terms that the government was precluded from laying any such burden upon him. It is a far cry from the fishing operations of the members of an uncivilized tribe of Indians at the time of the execution of this treaty, and the commercial fishing business now carried on by these petitioners. Of course there is nothing to indicate that when the Quinaielt treaty was executed such taxes [49] as are here involved had been even conceived. The parties to that treaty, certainly, did not contemplate the present situation.

It is undoubtedly true that the Federal government is not empowered to lay a tax upon the exercise of the right of the petitioners to fish in the waters of this reservation and the petitioners may not be restrained or regulated in the exercise of that right except by their own Tribal Council. They are, however, citizens of the United States engaged in a gainful occupation from which they derive income which is theirs to use and spend as they see fit. Therefore since there is no contractual or statutory exemption to which they can point, or we have found, exempting them from payment of the tax imposed on the income of "every individual,"

Reviewed by the Court.

Decision will be entered for the respondent. [50]

The Tax Court of the United States
Washington

Docket No. 1798.

CHARLES STROM AND FLORA STROM,
Husband and Wife,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the Findings of Fact and Opinion of the Court promulgated March 29, 1946, it is hereby

Ordered and Decided, that there is a deficiency in income tax for the year 1941 in the amount of \$169.67.

Enter:

/s/ J. RUSSELL LEECH,
Judge.

Entered March 29, 1946. [51]

[Title of Tax Court and Cause]

STIPULATION AS TO VENUE

The petitioners and the respondent, by their respective attorneys, hereby stipulate, in accordance with the provisions of Section 1141(b)(2) of the Internal Revenue Code, that the decision of the Tax Court of the United States in the above-entitled case may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ L. B. DONLEY,

/s/ L. L. Thompson.

Attorneys for Petitioners.

/s/ SEWALL KEY,

Acting Assistant Attorney
General.

Attorney for Respondent.

Dated this 31st day of May, 1946.

[Endorsed]: T. C. U. S. Filed June 17, 1946.

In the United States Circuit Court of Appeals
For the Ninth Circuit

U. S. Tax Court Docket No. 1798

CHARLES STROM and FLORA STROM,
Petitioners on Review,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITION FOR REVIEW AND
ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

I.

The petitioners herein referred to as the taxpayers are husband and wife and are residents of the Village of Taholah, Grays Harbor County, in the State of Washington. The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, herein referred to as the Commissioner. An agent and representative of the respondent, upon information furnished by the taxpayers, caused to be filed for and on behalf of the taxpayers an income tax return for the year 1941 with the Collector of Internal Revenue for the Western District of Washington, whose office is located within the Federal Judicial District wherein the taxpayers also reside. The parties hereto have stipulated that the de-

cision of the Tax Court herein referred to may be reviewed by [53] the Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner determined a deficiency in income taxes against the taxpayers for the year 1941 in the sum of \$169.67, and in accordance with the provisions of the applicable statutes, sent to the taxpayers by registered mail a notice of said deficiency. Within ninety days thereafter the taxpayers filed a petition for review from the said notice of deficiency in the Tax Court of the United States. The case was in due course submitted to the Tax Court upon a written stipulation of facts and upon certain evidence offered by the taxpayers. On March 29, 1946, the Tax Court promulgated its findings of fact and opinion in said proceedings, and on April 1, 1946, entered a judgment and final order of redetermination wherein and whereby it ordered and decided that there was a deficiency of \$169.67 in the taxpayers' income tax for the year 1941.

III.

The alleged deficiency in taxpayers' income taxes were in controversy before the Tax Court of the United States and arose from the following facts:

Petitioners are restricted members of the Quinault Tribe of Indians, and during the year 1941 and at all times since lived on the Quinault Indian Reservation in Grays Harbor County, Washington. This reservation was created by executive order of the President of the United States on November 4,

1873, which order was made [54] pursuant to a certain Treaty entered into between the United States and the Quinault Indian and certain other Indian Tribes on July 1, 1855. By the terms of this Treaty the Quinault Tribe, who were the ancestors of the petitioners, and the other Tribes who were signatories to this Treaty, ceded to the United States their claim to large and substantial areas of land in the western part of the State of Washington, particularly between the Olympic Range and the Pacific Ocean. Said Treaty, however, reserved for the use and occupation of the Tribes tracts of land sufficient for their wants to be selected by the President, and prohibited the residence of white persons on the reservation without the permission of the Tribe. The lands included within the boundaries of the Quinault Indian Reservation are entirely forest lands and are and never will be suitable for agriculture. There flows through said Quinault Indian Reservation a river known as the Quinault River, which river has from time immemorial been the habitat of a very fine specie of salmon known as Quinault salmon. These salmon are available for the taking only at certain times in the spring and fall of each year, and the run from year to year varies from a negligible quantity to a substantial amount. Salmon are caught by the use of set nets along the river, the location for such nets having been set aside pursuant to Tribal rules and regulations. The only means of livelihood which petitioners and the members of the Tribe had in 1941 and for many years previous, was from

the sale of timber allotted to the members of the Tribe on the reservation and from the catching and sale of Quinault salmon. Allotted timber is sold by the Commissioner of [55] Indian Affairs at a price determined by him, and the proceeds of such sale is by the United States paid at such times and in such amounts as the Commissioner of Indian Affairs, in his discretion, may determine. All of the income upon which this deficiency tax was levied arose from the catching and sale of Quinault salmon by the taxpayer, Charles Strom, in the year 1941. These salmon were sold in their natural state as they were taken from the waters of the Quinault River, by petitioners to fish buyers who are licensed to engage in that business in the discretion of the Commissioner of Indian Affairs of the United States. Delivery of the salmon was made within the boundaries of the reservation, and they were not processed or placed in a condition for sale or consumption by the taxpayers. Previous to the year 1922, the members of this Tribe filed no income tax returns from income arising out of the sale of this salmon under appropriate order and instruction of the Commissioner of Indian Affairs. In the year 1922 or 1923 the members of the Tribe were instructed to file returns and a few of them did so; but a few months thereafter they were instructed by the Commissioner of Indian Affairs that under appropriate rulings of the Department of Internal Revenue they were not required to file such income tax returns. Pursuant to rulings of the Department of Internal Revenue and of the

Attorney General of the United States no returns upon this type of income were filed or required to be filed by any of the members of this Tribe until the year 1943, when the Department of Internal Revenue then insisted that tax returns be filed for the year 1941 covering income arising from the sale of such salmon.

IV.

The petitioners say that in the records and proceedings before the Tax Court of the United States, and in the decision and final order of redetermination rendered and entered by the Tax Court, manifest errors occurred to the prejudice of petitioners, and they assign and assert that the following errors, and each of them, occurred in said record, proceedings, decision and final order of redetermination, and that upon these they rely to reverse the said decision and final order of redetermination so rendered and entered by the Tax Court of the United States, to-wit:

1. The erroneous determination of the Tax Court that the provisions of the general statutes of the United States, providing generally for a tax upon net income, apply to and cover the income herein involved, that is to say, income arising from the sale of fish caught and sold by the taxpayers in the Quinault Indian Reservation, under the facts and circumstances shown by the record.

2. In holding that under the provision of the Treaty of July 1, 1855, between the United States and the Quinault and other Indian Tribes, the Gov-

ernment of the United States had the right to levy an income tax upon income of this character.

3. In failing to construe said Treaty liberally and in accordance with the understanding as to its meaning originally agreed to between the representatives of the United States and of said Tribe at the time the Treaty was made. [57]

4. In holding that this Treaty did not create a vested right in the petitioners to take these fish and sell them free from taxation, which could not be taken away under the provisions of the Fifth Amendment to the Constitution of the United States the protection of which is hereby invoked by petitioners.

5. In refusing to hold that on account of relations between the Government and these Indians that the Government, by its conduct during the period from 1923 to 1943, acting through the Department of Indian Affairs and the Office of the Attorney General and the Bureau of Internal Revenue, was not precluded in equity and justice from seeking to collect this tax.

6. In refusing to hold in any event that the sale of this fish by petitioners should be regarded as a sale of a capital asset without gain, and therefore not subject to a tax.

7. In entering a deficiency judgment against the petitioners for income taxes for the year 1941 in the sum of \$169.67, or in any sum whatsoever.

Wherefore, petitioners petition that said decision

of the Tax Court of the United States be reviewed by the Circuit Court of Appeals for the Ninth Circuit; that a transcript be prepared in accordance with law and the rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken by said court to the end that the errors complained of may be reversed and corrected.

/s/ L. B. DONLEY.

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

State of Washington,
County of Pierce—ss.

L. L. Thompson, being first duly sworn, on his oath says that he is one of the attorneys of record for the petitioners named in the foregoing petition for review, and as such is authorized to verify said petition; that he has read said petition, knows the contents thereof, and that the statement of facts therein is true.

/s/ L. L. THOMPSON.

Subscribed and sworn to before me this 12th day of June, 1946.

[Seal] CLARA J. COWLEY,
Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: T.C.U.S. Filed June 17, 1946.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

Please Take Notice that the petitioners on the 17th day of June, 1946, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review and assignments of error by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the board heretofore rendered in the above entitled cause. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of June, 1946.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

Personal service of the foregoing notice, together with a copy of the Petition for Review and Assignments of Error mentioned therein, is hereby acknowledged this 17th day of June, 1946.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 17, 1946.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE EVIDENCE

This cause was heard before the Hon. Arthur J. Mellott, a Judge of the Tax Court of the United States at the Federal office building in the City of Seattle, Washington, on October 30, 1944, all parties being represented by their attorneys of record. At said trial the following proceedings were had:

There was filed and submitted to the Tax Court a written stipulation of facts.

Counsel for petitioners then offered in evidence petitioners' Exhibit No. 1, which was a photostatic copy of a letter dated March 22, 1854, from Isaac I. Stevens, Governor and Superintendent of Indian Affairs, to Col. W. T. Simmons.

There was then admitted in evidence petitioners' Exhibit No. 2, which was a photostatic copy of a letter from the Office of Indian Affairs dated August 30, 1854, signed by Charles E. Ellis to Isaac I. Stevens, Governor of Washington Territory.

Petitioners' Exhibit No. 3, which was a photostatic copy of a letter dated December 21, 1854, from Isaac I. Stevens to the Commissioner of Indian Affairs, was received in evidence.

Petitioners' Exhibit No. 4, which was a photostatic copy of a letter dated March 21, 1855, and signed by Governor Isaac I. Stevens was admitted.

Petitioners' Exhibit No. 5, which was a photo-

static copy of a letter dated June 18, 1855, and signed by Isaac I. Stevens, Governor and Superintendent of Indian Affairs, was received in evidence.

Petitioners' Exhibit No. 6, which was a photostatic copy of a letter written from Fort Benton, signed by Isaac I. Stevens, Governor and Superintendent of Indian Affairs, was received in evidence.

Petitioners' Exhibit No. 7, which was a document entitled "Report" dated December 30, 1855, addressed to the Honorable Isaac I. Stevens, Superintendent of Indian Affairs, was received in evidence.

Petitioners' Exhibit No. 8, which was a photostatic copy of a letter dated May 25, 1856, signed by Isaac I. Stevens, Governor and Superintendent of Indian Affairs, to Commissioner of Indian Affairs, was received in evidence.

[Printer's Note: Petitioners' Exhibits 1 to 8 are set out in full at pages 59 to 83, inclusive, of this Record.]

CLEVELAND JACKSON,

a witness for and on behalf of Petitioners was then sworn and testified as follows: [62]

Direct Examination

I live at Taholah, Washington, and am a member of the Quinault Indian Tribe. I am chairman of the Indian Tribal Council, which is the governing council of the Quinault Tribe. I am 51 years old

and have resided on the reservation practically all my life off and on. An income tax was levied in the year 1923 against some of the Indians on the Quinault reservation for 1922 income. Four or five Indians paid it that year. I do not recall exactly how many. They were informed by W. B. Sams, then the Superintendent of the Agency, that they had to file an income tax return so he helped them to fill it out. Five or six filled it out and filed it under protest. Mr. Sams made the protest and said he would see what he could do about it. The tax return was filed sometime in either April or May and then in the middle of the summer Mr. Sams came up there and held a meeting and informed them that he had corresponded with the Commissioner of Indian Affairs who had corresponded with the Internal Revenue Department and informed them that they didn't have to file any more returns and they didn't file any at that time or since that time until the year 1941 when requests came in. I was at that meeting and heard Mr. Sams discuss it and he told me personally. I was one of the persons involved in that. I filed a return so the information was personally pertinent to me. This had to do with income from fishing operations and did not cover income off the reservation. I next learned that the Government was making an effort to collect taxes from fishing operations in the [63] summer of 1943, or it might have been 1942. Between those dates no request was made to me at any time concerning any income tax from the proceeds of fishing on the Indian Reser-

vation. The run of fish running up that river varies very much from year to year, from practically nothing up to \$10,000.00 a season for a certain good location. The first good year I remember was about 1911. It wasn't until 1922 and then 1930 and 1941 and 1942 that there were other good years. 1943 and 1944 the run wasn't good enough to buy and pay for the equipment. The gear is obtained from a concern that has an Indian traders license and is licensed by the Department of the Interior and it is their practice to furnish the equipment for the fishermen. As the fish are caught they deduct 50% toward the payment of this equipment until the equipment is paid for. A fisherman to fish his location on the river must buy gear. They must buy gear before they can do any fishing at all; that is necessary. It is made out of linen twine. The web part is made out of linen twine and then there are a series of different sizes for different kinds of fish and then after you get them they have to be put on ropes. The top is lined with cork and the bottom with lead so that it will stand straight up and down in the river. The fish push their heads through the nets and are caught. Every fisherman has to buy gear in order to fish. The fishermen take what they need in the way of smoked fish, there is some home canning, some mild salt cured and then what they get over and [64] beyond that they sell. During the last two years there hasn't been enough fishing to pay for the equipment used and there is no way of knowing when there will be another good year.

Cross Examination

I have been a member of the Quinault Tribe during all of these years that I have testified about. I filed an income tax return in 1923 for 1922 under instructions from the Superintendent of Indian Agency. We never saw a collector over there and mine was filed with the Superintendent and he filed it with the Revenue Department. I know three others for sure who filed returns for 1922. I said I had some further discussion on that situation with Superintendent Sams. He told me that he had instructions from the Indian Department, the Commissioner of Indian Affairs, that we were not subject to income taxes. They did not give any more specific information about that. I did not file any returns from that time on. Later on request was made that the members of the tribe file returns for the 1942 season. I was present when the agents were there. They came and talked to me. He came with a bunch of blanks and said they had to file returns and that he would be very glad to help them fill them out. The catch of fish from a single location may run from nothing to \$10,000.00. There are one hundred and one locations on this river that are surveyed out and some are not worth fishing. The Indians purchase gear from the Indian traders. They are not necessarily required to but they do that. The traders know [65] the kind of equipment and that kind of equipment isn't handled everywhere. There is just one wholesale house in Seattle that handles that and they don't sell retail. If they could get it they could

come to Seattle or Tacoma. They don't sell at retail and they are sold in 100-pound balls and you have to buy a 100-pound ball in order to get one, therefore it is more or less of a pool affair. The Indians as a tribe are free to buy wherever they please. As a matter of practice and convenience they buy from traders. They can get credit against future catches of fish. The traders get a benefit out of that service. If the volume is good they get a little more profit. They get little profit on the sale of gear. I worked for a trader at one time. The trader generally sells on a ten and fifteen cent margin on stuff that will retail from \$3.00 to \$5.00 per pound. Under government regulations they are allowed 20%.

Redirect Examination

In speaking of a \$10,000.00 catch, that is gross, out which you would have to pay expenses and when you get that many fish you have to have help.

FRANK W. LAW

was called as a witness on behalf of the petitioners, and being sworn testified:

I reside in Taholah, Washington, and am treasurer of the Quinault Indian Tribe and have been Chief of Police. I heard Mr. Jackson's testimony relating to the assessment of income taxes in 1922. Returns were made in 1923. Mr. Sams advised the

Indians later in the summer that they didn't have to pay any more taxes on fishing. I was not present at the meeting but I was Chief of Police and was kept pretty well advised. Mr. Sams advised me that the Indians did not have to pay income taxes on the fish. I heard Mr. Jackson's testimony relative to the returns from fishing and how they run. I have nothing to add to that but I believe there are only two people up there that have made that much since I have been there. I agree with Mr. Jackson's testimony except that there was a good run in 1915.

OSCAR McLEOD,

called as a witness for and on behalf of petitioners,
being sworn testified as follows:

I live at Taholah, Washington, and am a member of the Quinault Indian Tribe and a member of the business committee of the Tribe and the United States Indian Police. I have resided on the reservation about 33 years; have been engaged in fishing and am familiar with the runs of fish for the years that I have been there. The run of fish varies very, very much. As to the good years in the last 33 years the first one was in 1915 and the next one in 1922, and then 1923 and 1924 were fair years but not like 1922. Then we have some again around 1930 and 1931 and then there wasn't much until 1940 when they started a little bit, and then 1941 was a big year and 1942 was smaller again.

In 1943 there wasn't much, there was a few of them who would make a day's wages for themselves if they worked hard. In 1944 there was not a thing. I never put a net in [67] the water. The Indians used the fish for food but not a great deal of it. This fish comes all at once and they can't eat very much of the catch during the run. The people process fish for winter use; they have their canners can them and then they have lots of them dried, too, and some of them can themselves and some of them salt them.

Cross Examination

In 1944 I did not put a net in the water in the spring run. There was plenty of nets below me and not one of them was catching anything. I was watching the fellow below and his net. It costs \$10.00 to \$15.00 a day to operate one of the sites and there is no use putting them out for 50 cents a day. You have to have the lead ropes and corks and nets and then these nets rot fast and you have to be careful to see that they do not rot before the run is over. You have to get your nets ready and wait until they come. If you had your net out and you didn't know they were coming that night, you wouldn't have any net. There is lots of angles to it. When there is not many fish they hit mostly in the day and when there is a good run they run night and day. You watch them night and day. You have to run a boat out to take the fish every two or three hours when they are running and you have to get your net out Saturday night at eight

o'clock and you cannot fish until Monday morning at six o'clock on a portion of the river. You ask me to explain how the expenses can amount to as much as \$15 a day. The net will cost around \$75.00 or \$80.00, besides the rest of it [68] that you put on it, and they will last about two weeks when the fish are running. Sometimes they won't do it. There is a condition that exists in the river, and it seems like the water is stagnant. Nobody knows exactly what it is, but a net will get black and in a few days it will just fall to pieces. That is why it costs so much operate.

Q. Now, Mr. McLeod, when you testified there were no large runs in certain years, that doesn't mean that the Indians didn't catch any fish, does it?

A. That spring run, sometimes they would get a few fish, and sometimes they would get a few fish in the fall, but it would be a small run.

Q. They always fish for purposes of supplying their families, do they not? A. Yes.

Q. And you always catch a few fish?

A. You usually catch a few, enough to eat, yes. You take it in the fall, there are generally a few.

Q. When you say there were no fish catches, you mean there were no good fish catches in commercial quantities? A. That's right.

Q. But there are always some for private consumption? A. There is some, yes.

HARRY SHALE,

a witness for petitioners, being sworn testified as follows: [69]

I am a member of the Quinault Tribe; have lived on the reservation all my life. I am a member of the tribal council and have a fishing location. I have been engaged in fishing on the reservation between 45 and 47 years. I heard the testimony of Mr. Jackson and Mr. McLeod with regard to the fishing and the good years and bad years. I agree with their testimony in the matter and have nothing to add to it.

CHARLES STROM,

the petitioner in the case, being sworn testified as follows:

I reside at Taholah and am a member of the Quinault Tribe. I heard the testimony of Mr. Jackson and Mr. McLeod with reference to income taxes, and the fishing seasons, and so forth. I agree with what they said. I only want to add that I have been fishing since 1911 and there has only been three runs of salmon ever since I fished; there was 1915, 1922 and 1941. Those were the peak years. The rest of the time you would make nothing. You wouldn't make enough except to get some fish to eat. You would just about make enough to live.

PETITIONERS' EXHIBIT No. 1

(Copy)

Office of Supdt. Indian Affairs

Olympia W. Ter.

March 22, 1854

Col. M. T. Simmons

Sir:

You having been appointed a Special Indian Agent, for the District of Puget Sound, in this Territory, the following instructions are transmitted for your guidance.

The limits of your district comprises all that portion of the Territory lying west of the Cascade Mountains and north of the main Chehalis and Skookum Chuck Rivers.

Your pay as Special Agent will be at the rate of \$750 per annum to commence from the 9th inst. the date of your employment. You will however be recommended to the Dept. as a full agent, and in case of approval your salary will then be at the rate of \$1500 per annum. In addition to your necessary travelling expenses, you will be allowed lights, fuel and stationery for your office.

You are authorized to employ a suitable person at a salary of not exceeding five hundred dollars per annum to act as interpreter with the Indians. Whose name you will communicate to me, that he may be nominated for confirmation by the Department. You will as soon as practicable select a site for the agency at some central [71] point upon the Sound and for

this purpose are authorized and directed to take up a tract of land in your official capacity, which tract will not exceed a full section or one square mile of land. Upon this you will establish a small temporary building, and will proceed to record the claim in the office of the Surveyor General of Oregon. The southern end of Whitby's Island is suggested as probably offering a suitable location. Due care should be taken that it be accessible to the water, and at the same time fit for agricultural purposes.

You are expected to enter forthwith upon a tour through the various tribes embraced within your District, for the purpose of acquainting yourself thoroughly with their condition, instructing them as to their relations with the citizens, and preparing the way to future negotiations. For this purpose you will organize small bands, not at present united, by gathering them into tribes, having reference to their general affinities, and by procuring the selection of head chiefs and of assistant or lesser types. Over the larger existing tribes will also direct the appointment of head and sub chiefs, taking care that in every case they be persons who, in your opinion will control them to best advantage. To these respectively you will issue commissions of the forms enclosed, filling up the blanks and making a record of the persons to whom they are given. [72] This record, together with all subsequent changes should be carefully kept, and a copy transmitted to this office, with your quarterly report.

In commissioning those persons, whom you shall

determine to recognize as chiefs or petty tyees, you will explain to them that hereafter they will be held responsible in the first place for all offenses committed against citizens by Indians of their tribe. That the head chief will in such cases be called upon for delivery of offenders, and the smaller chiefs looked to for his support, but that should they be unable without assistance from the government to make arrests, such aid will be given at their request. You will likewise inform them that on failure to do their duty, they will be removed and others appointed in their place, and that in every case of resistance by a tribe to the authorities, it will be dispersed by force and not considered in any future treaties of payments for land.

You will on every occasion press upon the citizens of the Territory, the demands of justice in their treatment of the Indians, and upon the Indians the necessity of honest and friendly conduct towards the citizens. When claims are preferred by Indians for damages, or remuneration for labor, you will carefully investigate them, and if satisfied that they are correct, you will on refusal to make them good, bring suit [73] (in the name of the United States), to recover them. When on the other hand claims are made by citizens for loss or damage by the Indians, you will in like manner examine them, and as the case may warrant adjust the same, or report the facts to the superintendent for his decision. Your particular attention is directed to the suppression of the liquor traffic, and to the bringing persons engaged therein to justice. For the details on this and

other points, you are referred to the laws relating to Indian Affairs.

You will make a careful census of the various tribes and bands according to the form herewith enclosed; ascertain as near as may be the boundaries of the territory claimed by each. Examine into the location and quantity of land necessary for reservation, and collect such other information as will in your opinion assist the Superintendent or such persons as may hereafter be commissioned to treat with the Indians. In fully understanding their relations to the Government and to the citizens of the Territory, as well as the means which may best conduce to their welfare.

In undertaking your tour of inspection you will commence with those tribes whose relation to the whites are most critical, [74] as the Clallams upon the Straits of Fuca and the Indians on Bellingham Bay. After giving due attention to these and the tribes on the Sound, unless circumstances should render expedient a different course, you are recommended to visit the coast between the Quinault and Cape Flattery, for the purpose of gaining information as to the Indians of that district of country.

Your returns are to be made quarterly, commencing on the 1st of July. Estimates of the expenses of your agency for the ensuing year must accompany your report of Oct. 1st, which should be punctually made, that they may be transmitted to the Department in time for the annual requisition. A small sum of money is herewith furnished for your im-

mediate expenses which will hereafter be increased. Accurate accounts of your travelling and other disbursements must be kept and regularly rendered. I cannot too much impress upon you the necessity of economy and care in this respect.

Very respectfully,
Your obt. Servt.

/s/ ISAAC I. STEVENS,
Gov. Wash. Ter.
Supdt. Indian Affairs. [75]

The National Archives, Washington, D. C. Record copies of letters sent by the Washington Superintendent of Indian Affairs.

PLAINTIFFS' EXHIBIT No. 2

Department of the Interior,
Office of Indians Affairs

August 30th, 1854.

Sir:

By requisition of this office of the 12th instant, the sum of \$10,000 will be placed in your hands, or remitted to you from the appropriation of \$45,000 made by the Act of Congress approved July 31st, 1854, "for expenses of negotiating treaties with and making presents of goods and provisions to Indian Tribes in the Territory of Washington."

It is the expectation of the Department that the sum appropriated, will prove sufficient to defray all

expenses incurred in and incident to making conventional arrangements designed to be permanent, with all the Tribes and fragments of Tribes within your Superintendency, by which the United States will extinguish their claim of title to all the lands within the Territory, excepting such limited districts as it may be necessary to assign them for their occupancy in future; and I have now to inform you that you have been designated by the President as the Officer of the Indian Department to conduct the negotiations and conclude the treaties of amity and acquisition that are thus provided for.

The remittance of \$10,000 above referred to, was made to enable you [76] to enter upon the discharge of the duty hereby assigned you, as soon as you arrive in Washington Territory, and the funds will be applicable for the purchase of presents, of goods and provisions, and for defraying all expenses of a preliminary and incidental nature, connected with the negotiations, etc.

In accordance with the request made in your letter of the instant, I have directed the articles of dry goods and hardware embraced in the schedules therewith furnished by you, to be processed from the contractors with this office for Indian goods, and it is expected that the two lots, one of \$8000 in value, and one of \$12,000 will be shipped from New York to San Francisco, by fast sailing clipper ship, in a few days, to be forwarded to you, as you requested, \$8000 to Columbia Barracks, care of the U. S. Quartermaster, and \$12,000 to Olympia. Schedules of the

goods, thus procured, will be transmitted to you at Olympia, and as they will be shipped to the care of the Collector at San Francisco, you will correspond with him, as to the more safe, speedy, and proper way of sending them thence to their respective destinations.

In concluding articles of agreement and convention with the [77] Indian Tribes in Washington Territory, you will endeavor to unite the numerous bands and fragments of tribes into tribes, and provide for the concentration of one or more of such tribes upon the reservations which may be set apart for their future homes.

The formation of distinct relations with each of the forty or fifty separate bands of Indians in Washington Territory would be as likely to promote the best interests of the white settlers or of the Indians, as if the latter could be concentrated on a limited number of reservations, or on contiguous reservations in a limited number of districts of country apart from the settlements of the Whites.

Unless some such arrangement can probably be effected, you will at present conclude treaties with such tribes or bands only, as are located immediately adjacent to the settlements of the Whites, and between whom and our own citizens animosities prevail, or disturbances of the peace are reasonably apprehended, and in entering upon the execution of the duties with which you are hereby charged, you will turn your attention first to such tribes and bands.

It is desirable also that the stipulations to be ful-

filled annually on the part of the United States, be few [78] in number, and that the Department retain the authority to apply the funds to a variety of objects, such as the circumstances of the Indians at the time of payment may require.

This suggestion you will regard particularly if you are unable to effect the combination of all the Bands into six or eight Tribes, or to arrange half a dozen treaties or less, so that every one of the tribes shall be a party to one of them.

It is not deemed necessary to give you specific instructions as to the details of the treaties. I however, enclose to you herewith, copies of the treaties recently concluded by Supt. Palmer, at Table Rock and Cow Creek, Oregon Territory, with the Rogue River and Cow Creek Indians and also printed copies of treaties lately concluded at this city with the Omaha and Ottoe and Missouri Indians.

Those negotiated by Supt. Palmer are regarded as exhibiting provisions proper on the part of the Government and advantages to the Indians, and will afford you valuable suggestions. Those with the Omahas and Ottoes and Missourias, will indicate the policy of the Government in regard to the ultimate civilization of the Indian Tribes, the graduation of annuity payments secured to them, the encouragement of [79] of schools and missions among them, the exclusion of ardent spirits from their settlements—the security to be given against the application of their annuity funds for payment of debts and claims; the terms on which roads and railroads may be con-

structed through their reservations, and the authority proper to reserve to the President, of determining the manner in which annuities of Indians shall be applied for their benefit.

I would here remark, that the amounts secured to Tribes in Nebraska will not be a criterion for you, in regard to the amount of the annual or other payments to be made to Tribes in Washington, under stipulations of the proposed Treaties, in as much as the former held lands which had become valuable by reason of their proximity to the State of Iowa, whilst the latter have claims of title based on occupancy alone, and that occupancy of a nature not fixed, and well defined as to boundaries and the lands which they claim are far removed from the portions of the country which have been long settled, and highly improved and cultivated.

I would also refer you to the late annual report of this office, and the last annual report of the [80] Secretary of the Interior, from which you will perceive that it is regarded by the Department as the best policy to avoid, as far as it can be judiciously done, the payment of Indian annuities in money, and to substitute implements of agriculture, stock, goods, and articles necessary to the comfort and civilization of the Tribes.

You will bear in mind the distance that separates you from the Capital, and the time which must elapse from the negotiation of treaties until you hear of the action of the President and Senate upon them; and you will hence caution the Indians against ex-

pecting the first payments of annuities too soon after the conclusion of negotiations.

You will at your early convenience, furnish to this office a skeleton map of Washington Territory, showing the location of the different tribes and bands, and the boundaries of the regions respectively claimed by each; and as treaties are concluded from time to time, in your reports accompanying them, furnish a description of the reservation provided for the occupation of the Indians, with such precision, that it may be marked on the map here.

With these general views, you will nevertheless exercise a sound [81] discretion, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached.

It is expected that a due regard to economy will govern all your acts; and that you will promptly report progress, in the execution of the trust now confided to you.

Very Respectfully

Your Obedt. Servt.

CHARLES E. MIX,

Acting Commissioner.

His Excellency Isaac I. Stevens, Governor of Washington Territory, present. [82]

The National Archives, Washington, D. C. Records of the Office of Indian Affairs. Letters received in the Washington Superintendency.

PETITIONERS' EXHIBIT No. 3

Olympia, W. Ter., Dec. 21st, 1854

Hon. G. W. Mannypenny,
Com. of Indian Affairs.

Sir:

A general system of operations in relation to the Indian Tribes in this Territory having been determined upon, I have in this to inform you briefly concerning it.

The Commission to treat with these Tribes has been organized and I have appointed Mr. James Doty Secretary.

It is proposed to proceed at once to hold Treaties with the Tribes west of the Cascade Mountains, upon Puget Sound and the Coast. Mr. M. T. Simmons, Special Agent for this District, has already been some days among the Indians in the vicinity, gathering them together and I shall proceed next week to hold a Treaty with them; then continue down the Sound, taking the Tribes as they are collected; thence across to the Pacific Coast, and thence up the Columbia River.

It is of great importance to the Territory and the Indians themselves, that Treaties should be speedily concluded, and Reservations selected upon which to place these Indians.

It is important that the great Council to [85] be held in the Blackfoot Country should take place as early next summer as possible, and in view of this I would urge the necessity of starting the goods, pro-

visions, etc., for that Council at an early day from St. Louis—say by the 15th of April. And I am strongly of the opinion that to insure the cheap and expediting transportation of the goods to Fort Benton, a steamer should be employed, to go to that point. All examinations of the river concur in the feasibility of the plan. In addition to the information I have already given you concerning the navigability of the Missouri, and the Report of Scouts D. Nelson, Saxton and Grover, I have the honor to transmit herewith the Report of James Doty. His examination, as you will perceive by the Report, was made when the river was at a lower stage than for several years previous, yet on the worst rapids the water was two feet in depth. The Fur Company's boats, drawing 26 inches of water, had then reached within 120 miles of Fort Benton, and by lightening them to 23 inches the pilots apprehended no difficulty in reaching the Fort.

It is not supposed, by anyone, that the Department can send up keel boats except at a ruinous expense. The interests of the Fur Company's trading on the Missouri, are in a considerable degree antagonistic to those of Govt., and no doubt they will oppose the employment of a Government steamer, with a view to transporting the Indian goods in their boats at exorbitant rates, and it is believed that any connexion with these companies will [86] be prejudicial to the interests of the Department and the Indians. For a plan of the steamer required to navigate the Upper Missouri I would refer to that which I filed in your Department.

It will be necessary for the Commission to leave the Point for the Blackfoot Country, in April, to avoid high water in the mountain streams, which occur in June. It is proposed that Delegations from all the Tribes East of the Cascade Mountains should be at the Council with the Blackfeet. These Tribes, as the Yakimas, Walla Wallas and Nez Perces, are scattered over a great extent of country ; and in order to have the Chiefs in readiness to proceed at the required time, it is necessary they should be seen and conversed with this winter. I have accordingly directed the Secretary, Mr. Doty, accompanied by the Agent for the District, to go among these Indians and prepare them for the great objects in view.

In a communication of this date, I shall urge upon the Department the necessity of an efficient Military Escort at the Blackfoot Council.

I am, Sir,

Very Respectfully,

Your Most Obt. Svt.,

/s/ ISAAC I. STEVENS,

Govt. Supt. [87]

The National Archives, Washington, D. C. Records of the Office of Indian Affairs. Letters sent by the Washington Superintendency.

PETITIONERS' EXHIBIT No. 6

Fort Benton, August 30th, 1855

Col. M. T. Simmons,
Special Agent,
Olympia, W. T.

Dear Sir:

In your annual report, you will include the Tribes present at the Gray's Harbor Council, and you are requested to present with great care and minuteness the plan you recommended for carrying into execution the Treaties made with the Indian Tribes. Your attention is especially called to the question of whether the Indians of your district shall be consolidated on one or two reservations. Your report will of course give a full account of your operations in the field. The conferences with Indians incident to treaties will have their place more properly in an official journal, copies of which will accompany my report transmitting the treaties.

I have been informed by Secy. Mason of your return from the Coast and of your success with the Indians in that quarter. I trust you may be equally successful with the remaining Tribes of the Gray's Harbor Council.

Very respectfully,

Your most obedient,

ISAAC I. STEVENS,

Gov. & Supt. W. T. [99]

The National Archives, Washington, D. C. Records of the Office of Indian Affairs. Letters sent by the Washington Superintendency.

PETITIONERS' EXHIBIT No. 7

C. Report of Agent M. T. Simmons

Olympia, W. T., Dec. 30th, 1855.

Honorable Isaac I. Stevens,
Superintendent of Ind. Affairs Wash. Ter.

Respected Sir:

According to your instructions I left Olympia May 23rd, 1855, on the Schooner A. B. Porter with others to aid me in my service, for the purpose of visiting Tribes of Indians on Puget Sound, to distribute goods intended as presents, to ascertain their number, their condition, their approbation of their treaties, likewise to make treaties with Tribes of Indians outside.

The following being the result of my mission:

Arrived at the Island reservation of the Squaschums, soon after proceeded to number them. I found 18 old men, 53 young men, 39 old women, 59 young women, 36 girls, 45 boys. My interpreter asked them what they most desired for their annuities, they replied that they desired 325 salmon lines, salt, twine, rope, caps, shirts, powder, lead, shoes, tobacco, axes, cut saws, files, blankets, drawing knives, cloth, calico, cotton, thread, large beads, shawls, needles, pins, fish hooks, sugar, biscuit, apples, vests.

I found old blind men, 1 old palsey woman, 35 corpulous boys, distributed the presents to the Indians, they being much pleased with the same, expressed themselves contented with their treaty.

I found assembled at the head of Cain Inlet the Skokomish Tribe. I then proceeded to number them. Found 44 old and 60 young men, 60 young women, 55 baby boys, 51 baby girls. * * * [100]

* * * lances. They received their presents with pleasure, gave them some good advice and departed.

25th inst. I started with the 3 gentlemen who aided me in my business on foot to reach the assembly ground of the Kwinaiatl to examine their ground and prepare to enter into treaties, reached this place on the 30th.

The Kwinaiatl River is a handsome river some 300 ft. wide, is navigable for canoes, about 30 miles to a larger lake, the finest salmon abound here.

July 1st, made a treaty with the Kwillehyute and Kwinaialt Tribes and Huh and Qui-eets band of the latter. Commissioned Hou Yak's head chief of the Quiel-by Tatu and Kal-Caps and Sah-ah-hah-white sub chiefs. Also Klernay aa hum sub chief of the Qui-ute-ls, proceedings of Treaty you will please find attached to my report.

The presents being most agreeably accepted by them, I found the men all with large knives in their hands, but all very friendly. I observed that a very few women could be seen.

On counting them, found to be 130 old and 175 young men, 20 old and 30 young women, 50 boys, 68 girls, 15 males and 10 female babies. Not any reported absent. All being in good health and appear to be quite contented.

On examining the saw mill and land, I came to the conclusion that the mill and farm claims to be very appropriate for the purposes intended. The saw mill can be purchased for the amount of \$5000.00, the 4 claims at \$1000.00 each, making in all for mill and claims nine thousand dollars. A small flour mill for the special benefit of all the Tribes on the Sound to be selected here would be very desirable, the cost of such a mill with stones, would be two thousand dollars. I would recommend the purchase of the saw mill, claims and the building of a flour mill.

The number of buildings that are required at this agency are eleven, as follows: Agent's house, store house, school house, teachers house, hospital, barn, council house, blacksmith's house and shop, farmer's house, physician's house.

The amount required to erect the above named buildings cannot possibly be less than twenty thousand dollars.

The amount required to erect the above named buildings and the necessary expenses during the year 1856 for the Puget Sound District W. Ter. will be ten thousand dollars.

The amount of money that will be required to defray travelling and other necessary expenses, in order to distribute the annuities and arrange all matters in connection with the treaties made with the Tribes on the Sound cannot be less than six hundred dollars per month or seven thousand two hundred dollars for the year 1856.

The present peculiarly disastrous position of our

Territory has brought about very serious changes in every relation to that which existed at the * * * *

The National Archives, Washington, D. C. Records of the Office of Indian Affairs. Washington Superintendency, W-94/1856 (Enclosure).

PETITIONER'S EXHIBIT No. 8

Office Supdt. Ind. Affairs, W. T.
Olympia

May 25th, 1856

Hon. Geo. W. Manypenny,
Commissioner of Indian Affairs,
Washington, D. C.

Sir:

I herewith enclose the Treaty made with the Quinai-etl and Quil-lip-ute Tribes of Indians on the Coast between Gray's Harbor and Cape Flattery.

In Col. Simmons' annual report, transmitted as one of the papers of my annual report reference is made to the council held with these Tribes. The programme of the Treaty was prepared by me previously to my leaving for the Blackfoot Country, and the Treaty itself was signed by me after my return.

Very Respectfully,

Your most obedient,

ISAAC I. STEVENS,

Gov. & Supdt. Ind. Affairs.

The National Archives, Washington, D. C. Records of the Office of Indian Affairs, Washington Superintendency, W-100/1856.

The foregoing is a statement of all the evidence adduced at the hearing before The Tax Court of the United States material to this proceeding, and is hereby agreed to.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of
Internal Revenue,

Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 17, 1946.

[Title of Circuit Court of Appeals and Cause.]

PRAECIPE FOR RECORD

To the Clerk of The Tax Court of the United States:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with reference to the Petition for Review heretofore filed by the petitioners in the above cause, a transcript

of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents, or certified copies thereof, to-wit:

1. The docket entries of all proceedings before The Tax Court of the United States.

2. Pleadings before The Tax Court of the United States as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

3. Agreed statement of facts, with all exhibits attached thereto but omitting therefrom Joint Exhibit 1-A. [104]

4. Statement of the evidence with all exhibits therein referred to.

5. The findings and opinion of The Tax Court of the United States.

6. The judgment and decision of The Tax Court of the United States.

7. The Petition for Review filed by the petitioners in the above cause.

8. Stipulation as to Venue.

9. The notice of filing of the Petitioner for Review filed herein, together with admission of service of such notice and the Petition for Review by counsel for respondent.

10. This praecipe with admission of service thereon.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

Personal service of the foregoing Praecipe for Record is hereby acknowledged this 17th day of June, 1946.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of
Internal Revenue,

Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 17, 1946. [105]

The Tax Court of the United States
Washington

[Title of Cause.]

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 105, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of July, 1946.

[Seal] /s/ VICTOR S. MERSCH, EMT

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11383. United States Circuit Court of Appeals for the Ninth Circuit. Charles Strom and Flora Strom, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 13, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11383

CHARLES STROM and FLORA STROM,
Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF PARTS
OF THE RECORD TO BE PRINTED

Comes now Charles Strom and Flora Strom, petitioners on review in the above entitled cause, and state that the points upon which they intend to rely in this court in this case are as follows:

1. That The Tax Court of the United States erred in holding that the provisions of the general statutes of the United States providing for a tax upon net income apply to and cover the income herein involved, that is to say, the income arising from the sale of fish caught and sold by the taxpayers, who are members of the Quinault Indian Tribe, within the boundaries of the Indian Reservation.

2. That The Tax Court erred in holding that, under the provisions of the treaty of July 1, 1855, between the United States and the Quinault and other Indian tribes, the government of the United States

had the right to levy an income tax upon income of this character.

3. That The Tax Court, in its opinion and decision, failed to construe said Indian treaty liberally and in accordance with the understanding originally had between the representatives of the United States and said tribe at the time the treaty was made.

4. That The Tax Court erred in holding that this treaty did not create a vested right in the petitioners on review to take and sell these fish free from income taxes under the provisions of the Fifth Amendment to the Constitution of the United States, the protection of which is hereby invoked by petitioners.

5. Previous to 1943, the Department of Indian Affairs, the office of the Attorney General of the United States and the Bureau of Internal Revenue had, in numerous rulings, held that income of this character was not subject to income taxes, and the Department of Indian Affairs had consistently advised the members of the tribe that they were not required to make returns or pay taxes on this type of income. Petitioners intend to rely upon the point that on account of the peculiar nature of the relationship between these Indians and the Government that the Government is now bound by its previous construction of the statutes and is precluded in equity and justice from seeking to collect this tax.

6. That The Tax Court erred in refusing to hold in any event that the sale of this fish by petitioners should be regarded as the sale of capital assets without gain and therefore not subject to a tax.

7. The general point will be made that for the reasons before stated, The Tax Court erred in entering a deficiency judgment against these petitioners in the sum of \$169.67, or in any sum whatsoever.

Petitioners on Review further state that only the following parts of the record as filed in this Court are deemed necessary to be printed for the consideration of the points set forth above, viz:

1. The docket entry of all proceedings before The Tax Court.

2. The pleadings before The Tax Court, omitting captions, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

3. The agreed statement of facts, omitting therefrom all exhibits thereto attached.

4. Statement of the evidence with all exhibits therein referred to.

5. The findings and opinion of The Tax Court.

6. The judgment and decision of The Tax Court.

7. The petition for review filed by the petitioners.

8. Stipulation as to venue.

9. Notice of the filing of petition for review with admission of service of such notice and a copy of the petition for review upon respondent.

Dated this 10th day of July, 1946.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

(Affidavit of Service attached.)

[Endorsed]: Filed July 15, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO OMISSION OF CERTAIN PORTIONS FROM THE PRINTED RECORD

It is hereby stipulated by the parties that, in printing the record in the above entitled cause, the Clerk shall omit therefrom the following documents and papers, to wit: All exhibits attached to the Agreed Statement of Facts.

It is further stipulated that the documents and papers above referred to shall be preserved by the Clerk of the Court and may be referred to by counsel or the Court if deemed necessary during the course of the argument, or otherwise during the disposition of the cause.

Dated this 23rd day of July, 1946.

/s/ L. B. DONLEY,

/s/ L. L. THOMPSON,

Attorneys for Petitioners.

/s/ DOUGLAS W. MCGREGOR,

Assistant Attorney General,

Attorney for Respondent.

So ordered:

/s/ FRANCIS A. GARRECHT,

Senior United States Circuit
Judge.

[Endorsed]: Filed July 23, 1946. Paul P.
O'Brien, Clerk.

No. 11383

IN THE

**United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT**

CHARLES STROM and FLORA STROM,
husband and wife,

Petitioners,

VS.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

UPON PETITION TO REVIEW A DECISION OF THE
TAX COURT VF THE UNITED STATES

BRIEF OF PETITIONERS

L. L. THOMPSON

L. B. DONLEY

Attorneys for Petitioners

Address: 1410-24 Puget Sound Bank Building
Tacoma, Washington

Ray Printing Co.—Tacoma

FILED

SEP 26 1913

PAUL P. O'BRIEN,

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IN THE
United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT

CHARLES STROM and FLORA STROM,
husband and wife,

Petitioners,

VS.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

BRIEF OF PETITIONERS

JURISDICTION

This is a petition for review of a decision of the Tax Court of the United States which sustained the action of the respondent commissioner in imposing income taxes in the amount of \$169.67 against petitioners for the year 1941. Jurisdiction rests upon the provisions of Title 26 U.S.C.A. Sec. 1141. The entire income sought thus to be taxed arose out of the sale by petitioners, who are incompetent Indians and members of the Quinault Indian Tribe and who reside in the Western District of Washington, of salmon caught by them within the boundaries of the Quinault Indian Res-

ervation. The return in question was made in the office of the Commissioner in the Western District of Washington. By appropriate stipulation it was agreed that the case could be reviewed by this Court (Tr. page 40). Such sales were consummated within the boundaries of said Indian reservation, and the fish were sold by petitioners to buyers in their natural state without being in any way processed. The imposition of the tax is resisted, among other things, upon the ground that it violates the provisions of the Treaty of July 1, 1855, and January 25, 1856, between the United States and the Quinault and other Indian tribes (12 Stat. at Large, page 987). The important portions of this Treaty were summarized by the Supreme Court of the United States in the case of Halbert vs. United States, 283 U. S. 753, 75 Law Ed. 1389, from which an extended quotation will be hereafter made. To save repetition such summary is not stated here.

STATEMENT OF THE CASE

The Government introduced no evidence in the case. Most of the facts were stipulated to in writing, although petitioners introduced some oral evidence which was not contradicted by the Government.

1. There is attached hereto as an appendix to this brief such written stipulation of facts, which stipulation is made a part of this brief at this point by reference.

2. In addition to the stipulated facts, the evidence shows that in the year 1923 the members of the Quinaielt Tribe were informed by the then local Indian Agent who had jurisdiction of their affairs that income taxes were required to be paid upon the net proceeds of the sale of fish caught by the members of the tribe in the waters of the Quinault River and within the boundaries of the Quinaielt Reservation in the year 1922. The evidence further shows that in some instances the taxes were so paid by some Indians (Tr. page 51). It further shows that soon thereafter and in the same year, the said Indian Agent at a meeting of the members of the tribe at Taholah, which is a town within the Indian Reservation, informed the members of the tribe that taxes upon this type of income were not required to be paid, and that thereafter no returns were made or taxes paid on the proceeds of the sale of fish thus caught by any of the members of the tribe, and that no demand was made upon the members of the tribe by either the Bureau of Internal Revenue or the Indian Department to pay such taxes until 1943 when, for the first time, demand was made upon the members of the tribe to pay income taxes on the net proceeds of fish caught in the year 1941 (Tr. page 51).

3. The evidence shows that the run of fish in this river is extremely variable and that there was

sometimes an interval of as high as nine years between good commercial runs (Tr. pages 55, 58). It further shows that there was a very light run in 1943 and practically nothing in 1944 (Tr. page 56).

4. There was introduced in evidence photostatic copies of certain governmental files taken in the Bureau of Archives at Washington, D. C., relating to the negotiations of the treaty referred to in the stipulation of facts. These documents, taken with other facts of which the court may take judicial notice, petitioners contend will show this treaty should be construed to prohibit the imposition of this tax. Inasmuch as these documents will be referred to in detail in the argument which follows, no resume of their contents will here be made. They appear on pages 59 to 83, inclusive, of the Transcript of Record.

SPECIFICATIONS OF ERROR

Petitioners assert that the tax court of the United States in this proceeding erred in the following particulars:

1. In holding that the provisions of the general statutes of the United States, providing generally for a tax upon net income, apply to and cover the income herein involved, that is to say, income arising from the sale of fish caught and sold by the

taxpayers in the Quinault Indian Reservation, under the facts and circumstances shown by the record.

2. In holding that under the provision of the Treaty of July 1, 1855, between the United States and the Quinault and other Indian Tribes, the Government of the United States had the right to levy an income tax upon income of this character.

3. In failing to construe said Treaty liberally and in accordance with the understanding as to its meaning originally agreed to between the representatives of the United States and of said Tribe at the time the Treaty was made.

4. In holding that this Treaty did not create a vested right in the petitioners to take these fish and sell them free from taxation, which could not be taken away under the provisions of the Fifth Amendment to the Constitution of the United States the protection of which is hereby invoked by petitioners.

5. In refusing to hold that on account of relations between the Government and these Indians that the Government, by its conduct during the period from 1923 to 1943, acting through the Department of Indian Affairs and the Office of the Attorney General and the Bureau of Internal Revenue, was not precluded in equity and justice from seeking to collect this tax.

6. In refusing to hold in any event that the sale of this fish by petitioners should be regarded as a sale of a capital asset without gain, and therefore not subject to a tax.

7. In entering a deficiency judgment against the petitioners for income taxes for the year 1941 in the sum of \$169.67, or in any sum whatsoever.

ARGUMENT

The foregoing specifications of error, to a considerable extent overlap and each point cannot, therefore, be separately considered without tedious repetition. For the purpose of argument, these points may be divided into the following general subdivisions:

(1) The effect of the treaty; (2) the proper construction of the Internal Revenue Act, even if the treaty be held to be not directly applicable; (3) the question of whether, in view of the peculiar facts and circumstances, the sale of this fish should not be deemed the sale of a capital asset; and (4) the question of whether the Government is not precluded in equity and good conscience from seeking to collect taxes upon the proceeds of the sale of fish caught previous to 1943.

The Treaty Precludes the Collection of This Tax

It is stipulated that petitioners were and now are members of the Quinaielt Indian Tribe. If the treaty is constructed generally to prohibit the imposition of the tax here involved, then the appeal must be sustained. Before discussing the specific provisions of the treaty, it is well to consider the historical facts which gave rise to the execution of the treaty by representatives of the tribe and Governor Isaac I. Stevens, then Governor and Superintendent of Indian Affairs of the Territory of Washington. The general geographical situation is to some extent set forth in the stipulated facts. A more complete description of the circumstances which caused the treaty to be signed, and the relationship between members of the tribe and the Government is set forth by the Supreme Court of the United States in the case of *Halbert v. United States*, 283 U. S. 753; 75 Law Ed. 1389, of which facts this court may refresh its recollection by reference to this decision. That case will be referred to in a later portion of this brief in more detail. For the present, it is sufficient to say that it involved a question of the construction of the identical treaty here involved, in another connection. In describing the general situation, the Supreme Court said:

“In 1855, the Quinaielt, Quillehute (also called Quiloute), Chehalis, Chinook, and Cow-

litz Indians were neighboring tribes in the southwesterly section of what is now the State of Washington. They were all known as 'fish-eating Indians' and lived in small villages adjacent to the Pacific coast and the lower reaches of the Columbia River. The Quits and Ozettes were also fish-eating tribes living in coast villages a little north of the others, the Ozettes being farther north than the Quits.

"During the early part of 1855 negotiations were had between a representative of the United States and representatives of the Quinaielt, Quillehute, Chehalis, Chinook, Cowlitz, and Quit tribes looking towards a cession by these tribes of much territory and their consolidation within a single reservation. These negotiations failed of their full purpose, but resulted in a treaty between the United States and the Quinaielts and Quillehutes which was signed on July 1, 1855 and January 25, 1856. By this treaty the Quinaielts and Quillehutes ceded a large district to the United States, and the latter engaged to reserve for their use and occupancy a tract 'sufficient for their wants,' to which when established they were to remove. There were also provisions in the treaty securing to the Indians the right of taking fish 'at all usual and accustomed grounds and stations', in common with all citizens of that section, and of erecting temporary houses to be used in that connection; authorizing the President, at his discretion, to survey the whole or any part of the reserved lands and assign the same to such individuals or families 'as are willing to avail themselves of the privilege and will locate on the same as a permanent home;' and consenting that the

President might 'consolidate' the Quinaielts and Quillehutes and 'other friendly tribes,' whenever in his opinion, the public interest and the welfare of the Indians would be promoted by it.

"Under the treaty a reservation of about 10,000 acres at the mouth of the Quinaielt river was provisionally selected and its boundaries surveyed. Some years later the local superintendent reported that the reservation, by reason of being small and containing but a small amount of agricultural and pasture lands, had proved unattractive to the Indians; that the Chehalis, Chinook, and other coastal tribes in southwestern Washington, like the Quinaielts and Quillehutes, who were parties to the treaty, were all 'emphatically fish-eaters,' drawing their subsistence almost wholly from the water, and that all of these fish-eating tribes should be collected on a single reservation, including suitable fisheries. To that end he recommended that the existing reservation be greatly enlarged and designated the territory which he believed should be included in it. This recommendation led to an order of November 4, 1873, by the President, the material parts of which are as follows:

'In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856, and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington territory . . . be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast, . . . '

“This enlarged reservation contained about 200,000 acres and included the prior provisional reservation of 10,000 acres.”

The significant things to be borne in mind from this recital are that the members of this tribe, previous to and on the date of the execution of the treaty were to a considerable extent dependent for their subsistence upon the taking of fish, and that no facilities were made by the treaty to give them opportunity to engage in agriculture or to follow any other occupation which would afford them subsistence.

The case of *Tulee v. Washington*, 315 US 681, 86 L. Ed. 1115, involved a treaty negotiated by Governor Stevens with the Walla Walla and Yakima Indians, who resided east of the Cascade Range in the State of Washington. This treaty was signed on June 15, 1855 (12 Stat. at Large 971), and in general contained substantially the same provisions as were included in the Quinalt Treaty, as we shall hereafter show.

In an effort to ascertain the circumstances under which these two treaties, in almost the same language, were negotiated within three weeks of each other in different parts of the territory, petitioners procured from the Department of Archives at Washington, D. C., photostatic copies of the offi-

cial record of the Department of the Interior concerning the negotiation of this treaty. The first document which was introduced was a letter from Charles Mix, then acting Commissioner of Indian Affairs under the Interior Department, dated August 30, 1854, and addressed to Governor Isaac Stevens, who had his headquarters in Olympia, Washington Territory, and who was also Commissioner of Indian Affairs in the Territory under the Interior Department (Trans. p. 63). This letter is too long to be set forth in detail. It begins by reciting the fact that Congress, by the Act of July 31, 1854, had appropriated \$45,000.00 for the purpose of negotiating treaties with all the Indian tribes in the Territory of Washington, and that the sum of \$10,000.00 had been assigned by the Indian Department for the use of Governor Stevens in the course of these negotiations. This money was directed by the communication to be used by Governor Stevens "for expenses of negotiating treaties with and making presents of goods and provisions to Indian tribes in the Territory of Washington". The letter then advised Governor Stevens that goods in the sum of \$20,000.00 would be shipped in a fast clipper ship to Olympia and to Vancouver, Washington, to be used by Governor Stevens in the course of his negotiations. The letter then gave to Governor Stevens authority to agree to give annual amounts

to the Indians with the thrifty suggestion, however, "that the stipulations to be fulfilled annually on the part of the United States be few in number, and that the department retain the authority to apply the funds to a variety of objects, such as the circumstances of the Indians at their time of payment may require. The letter then refers to various treaties which had theretofore been entered into with other Indian tribes, enclosing copies thereof, and made certain suggestions with respect to the treaties to be negotiated by Governor Stevens, but concluded "with these general views, you will nevertheless exercise a sound discretion, where the circumstances are such as to require a departure from them; and you will take care, in all treaties made, to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached." The advice was probably good, but the suggestion might be made that possibly the members of the tribe should have had somebody present to protect them from future approach by the Treasury of the United States.

Without reviewing this communication further, it may be stated that Governor Stevens was given \$30,000.00, which sum included the salaries and expenses of representatives of the Government to secure a cessation by the Indians of their claim to

the entire Washington Territory, and that Governor Stevens successfully secured this with the allotted sum. The material significance of this, insofar as the proper construction of the treaty is concerned, is that it shows that one of the impelling and important considerations which induced the Indians to sign the treaty was the recognition in Article III of the treaty that their fishing rights would in no wise be impaired.

Governor Stevens apparently undertook this task with energy and efficiency, because the records show that on December 21, 1854, he wrote to the Commissioner of Indian Affairs in Washington, D. C., reporting the action which he had taken (Trans. p. 69). In this letter he reported that he had organized a commission to treat with the Indians. The letter then continued: "It is proposed to proceed at once to hold Treaties with the Tribes West of the Cascade Mountains, upon Puget Sound and the Coast. Mr. M. T. Simmons, Special Agent for this District, has already been some days among the Indians in this vicinity, gathering them together and *I shall proceed next week to hold a Treaty with them*; Then continue down the Sound, taking the Tribes as they are collected; thence across to the Pacific Coast, and thence up the Columbia River."

Other than this recital by Governor Stevens, the

records do not definitely show what, if any, direct contacts Governor Stevens actually had with the Indians who resided west of the Cascade Mountains. Apparently, however, Governor Stevens did attend a council of these tribes at Grays Harbor sometime previous to March 25, 1855, because there is included in the records a letter from Governor Stevens to Col. M. T. Simmons, Special Indian Agent, and dated March 25, 1855, at Olympia (Trans. p. 72) in which letter Governor Stevens authorized Col. Simmons to negotiate treaties with substantially all of the Indians on the west side of the Cascades, including "the Indians brought into council at Grays Harbor". Grays Harbor is about fifty miles from the Quinault River and undoubtedly the Quinaielt Tribe attended this council. Apparently shortly thereafter Governor Stevens proceeded to the Walla Walla country, as he had indicated that he would in his letter of December 21, 1854, because Petitioners' Exhibit 6 is a copy of a letter dated June 18, 1855, at the council ground at Walla Walla, addressed to Col. Simmons and signed by Governor Stevens (Trans. p. 77). This letter first states that "the expenditures in effecting treaties this side of the Cascades much exceed all calculations". The significant portion of the letter, however, is the following statement to Col. Simmons: "I hope you will succeed in getting the Tribes

parties to the Grays Harbor Council to sign the programmed treaty which was drawn up just before I left Olympia." It is a reasonable assumption from the record, therefore, that Governor Stevens attended the Grays Harbor Council, discussed the situation with the Indians, then returned to Olympia, which is only some seventy miles from Grays Harbor, drew up this treaty, and left it with Col. Simmons for final signature by the Indians.

This finds full support in a report dated September 30, 1855, addressed to Governor Stevens by Col. Simmons (Trans. p. 80). It will be noted that this report is incomplete. However, while it bears no signature, on the first page it is labeled "report of agent M. T. Simmons". Referring to the Quinaielt Treaty, Agent Simmons stated: "The Kwinaielt River is a handsome river, some thirty feet wide, is navigable for canoes about thirty miles to a large lake, the finest of salmon abound here." It might be observed that this is the identical river and the identical salmon involved in this proceeding.

The report then recites that he made a treaty with the Quinaielt Tribe and that the "proceedings of the treaty you will please find attached to my report". Unfortunately, the report is incomplete, and with it the proceedings leading up to the treaty. Insofar as this treaty is concerned, he then con-

cluded with the statement that "the presents being most agreeably accepted by them, have found the men all with large knives in their hands, but all very friendly". We are not informed as to the particular presents which were thus distributed, but this seems to make it clear that the taking of what Col. Simmons refers to as "the finest of salmon" was a most important part of the negotiations.

The only two other documents which are of importance are a letter dated August 30, 1855, written at Fort Benton in the Idaho country by Governor Stevens to Col. Simmons (Trans. p. 79), and a letter written from Olympia dated May 25, 1856, by Governor Stevens to George W. Maypenny, Commissioner of Indian Affairs (Trans. 83). In his letter to Col. Simmons, Governor Stevens directed Col. Simmons in his annual report to "include the tribes present at the Grays Harbor Council." This letter also stated that "the conference with Indians incident to the treaties will have their place more properly in an official journal, copies of which will accompany my report transmitting the treaties". In his letter of May 25, 1856, to the Commissioner of Indian Affairs, Governor Stevens enclosed the treaty with the Quinaielts, and states that in the report of Col. Simmons, which was also transmitted, "reference is made to the council held with these tribes". The letter then continues: "*The program*

of the treaty was prepared by me previous to my leaving for the Blackfoot country, and the treaty itself was signed by me after my return". From this statement the conclusion is almost unavoidable that all of the preliminary negotiations leading up to the final signing of the treaty by the members of the various tribes were personally conducted by Governor Stevens at the Grays Harbor council.

It may seem to the court that the foregoing discussion is foreign to the issues involved in this appeal. We think that these facts are material, (1) because by these documents there is clearly revealed the fact that these treaties were negotiated as a part of a general negotiation personally conducted by Governor Stevens with all the Indian tribes in the State of Washington, including the Yakimas, to which treaty we shall presently refer, and (2) because, in order to interpret this treaty for the benefit of the Indians and as they understood it (*Tulee v. Washington*, *supra*) this history is material and of much significance.

We come now to the treaty with the Yakimas and other eastern tribes. As we have shown, after the Grays Harbor council had been held by Governor Stevens, he then caused to be drawn up and left with Col. Simmons the treaty involved in this proceeding, and thereafter departed for a similar

council and action, if possible, on the Walla Walla council grounds in Eastern Washington. This council eventuated in the Treaty of June 8, 1855, with the Yakimas and other eastern tribes (12 Stat. at Large, 951). This treaty is set forth almost in its entirety in the decision of the United States Supreme Court in *United States v. Winans*, 198 U. S. 371; 49 Law Ed. 1089. It is sufficient to say that it is almost identical with the Quinaielt Treaty and that Article III of the treaty with the Yakimas is, with a difference hereinafter set forth, an exact copy of Article III of the present treaty. Unlike the proceedings of the Grays Harbor council, a complete record of proceedings with the Walla Walla council was made and is on file with the National Archives in Washington, D. C.

The case of *Tulee v. Washington*, *supra*, was an appeal from the decision of the State Supreme Court in *State v. Tulee*, 7 Wash. (2d) 124; 109 Pac. (2d) 280. The defendant in that case in the State Court was represented by the Assistant District Attorney of the United States at Spokane, Washington, and also by a special solicitor from the Department of the Interior. As is shown in the opinion of the case, the Government introduced in evidence the record of the proceedings of the Walla Walla council, which record was referred to, although not quoted from, by the Supreme Court in *Tulee v. Washington*, *supra*.

We shall hereafter discuss the Tulee case with more particularity. For the present, we merely refer to the decision in the State Court in order to show the proceedings had at the Walla Walla council. The case was decided by the State Court adversely to the Indians, but three judges dissented, and Justice Simpson, the dissenting judge, sets forth in his dissenting opinion the following excerpts from the proceedings of the Walla Walla council:

“Among other things, Governor Stevens told the Indians,

‘We have near to our hearts the property of the Indians and the propositions to be made to you will prove it.’

Speaking of the tracts to be retained by the Indians, he said:

“On each tract we wish to have one or more schools; we want on each tract one or more blacksmiths; one or more carpenters; one or more farmers, we want you and your children to learn to make ploughs, to learn to make wagons, and everything which you need in your house. We want your women and your daughters to spin, and to weave and to make clothes. We want to do this for a certain number of years.

‘Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and your daughters will then teach their children, those who come after them to spin, to weave, to knit, to sew,

and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights and mechanics; besides this we want on each tract a saw mill and a grist mill.'

"At another time, he made the following statement concerning the care which the government would exercise in order to help the Indians:

'I have spoken of an agent, I will speak more. If we agree at the council we have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part go to the agent and tell him so, and he will see that we *do* do it. If we think you have not done your part the agent will go to the chiefs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out.'

"Again, he stated:

'If we make a Treaty with you and our Great Chief and his Council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer.'

"Governor Stevens made a definite state relative to the Indian's right to fish in the following words:

'There is plenty of salmon on these reservations, there are roots and berries. There is also some game.. You will be near the Great Road and can take your horses and your cattle down

the river and to the Sound to market . . .

‘You will be allowed to go to the usual places *and fish* in common with the whites . . . together with all outside the reservation.

‘In the paper for the Yakimas we have included the tribes who acknowledge Kam-i-ah-kan for their head chief. The Piscouse, the Swan-wap-um and Palouse, the Yakimas and all the bands on the Columbia below the Walla Walla down to the White Salmon River. They have their reservation and *fishing stations*, which they well know and which I understand is satisfactory . . .

‘You will not be called according to the paper to move on the reservation for two or three years; then *is secured to you your right to fish*, to get roots and berries, and to kill game; then your payments are secured to you as agreed; then your schools, your shops, and physicians and other things we have promised are secured; then the salaries, the houses and the 10-acre farms of your chiefs are secured to him . . .

‘I will ask of Looking Glass whether he has been told of our Council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, *that he can catch fish at any of the fishing stations . . .*’ ”

These, then, were the facts and circumstances which caused these Indians to surrender to the United States their ancestral rights which they had enjoyed for centuries and beyond the period of any

recorded history. They surrendered these rights for not to exceed \$45,000.00 and for the solemn promise of Governor Stevens that in any event the right of fishing upon which their very existences depended would never be impaired. In the light of this history, can it be said that it was understood by Governor Stevens or contemplated by the Indians that the treaty was intended to give to the Government the power to impose a minimum tax of 20% on the net proceeds of the sale of fish caught on a small reservation to which the Indians were compelled to remove. On principle, it would seem that there is but one answer to this: the right of these Indians to take fish was reserved without qualification and with emphasis by the Indians, and this right was definitely protected from the encroachments of anyone, including the Government of the United States.

The treaty with the Yakimas has been three times before the Supreme Court of the United States, and the present treaty has been twice examined by that tribunal. The three cases which involved the treaty with the Yakimas involved the fishing rights of the Indians and are, of course, directly applicable to the treaty with the Quinaielts, since, as we have shown, the language of the two treaties is almost identical. We propose now to examine these decisions.

United States v. Winans, 198 U. S. 371; 49 Law Ed. 1089, was an action brought by the United States for the benefit of certain members of the Yakima Indian Tribe to enjoin the defendant, the holder of a fixed appliance fishing license on the Columbia River, from preventing the members of the tribe from fishing at certain usual and accustomed places then occupied by a fishing wheel owned and operated by the defendant under a license from the State of Washington. The complaint was predicated upon the quoted provisions of the treaty. It was contended by the defendant that since the only right given by the treaty was the right to fish at all usual and accustomed places outside of the reservation *in common with the citizens of the territory*, that the Indians had no right to fish at locations previously pre-empted by white persons under applicable provisions of local law. This contention was denied by the Supreme Court in the following language:

“The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights, had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Ind-

ians, but a grant of rights from them, -- a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places', and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land, -- the right of crossing it to the river, -- the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty, and the *right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.*"

This case, then, definitely establishes the proposition that the fishing rights given by this treaty, whatever they are, apply to the United States to the same extent as they do to the State. This means

that, insofar as the power of taxation is concerned, if a state could not impose a tax upon the exercise of the right thus reserved, then neither could the Government.

The case is also of importance for another reason. The argument was made by the defendant that since the whites had superior capacity to devise and make use of fishing instrumentalities such as the fishing wheel, and since if a fishing wheel was used, this would physically operate to exclude the Indians from the location, then the treaty should be construed in the light of changed conditions. The court did not agree with this argument. It called attention to the fact that even if the taking of fish by white men could not be confined to a spear or crude net, that "it does not follow that they may construct and use a device which gives them exclusive possession of the fishing place". The court then made this observation: "The argument based on the inferiority of the Indian is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess." It may be contended that because commercial fishing in that day was not known, that consequently an imposition imposed upon the proceeds of the sale of fish should be considered as not prohibited by the treaty. This theory, if advanced, is sufficiently

answered by the quotation from the Winans case above referred to.

The fishing provision of this treaty was again considered by the United States Supreme Court in *Seufert Brothers v. United States*, 249 U. S. 194; 63 Law Ed. 555, in which case it was held that despite the technical language used in the treaty, members of the Yakima tribe had the right to fish on the Oregon side of the Columbia River and in the country of another tribe. The case is of importance here only to the extent that the act reiterates with added emphasis the rule of construction announced in the Winans case. After quoting the excerpt from the Winans case, heretofore quoted by us, and after pointing out that the understanding of the Indians was in accordance with the conditions made by the Government, the court concluded:

“To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty, which gives them the right of ‘taking fish at all usual and accustomed places and of erecting temporary buildings for curing them,’ and would substitute for the natural meaning of the expression used -- for the meaning which it is proved the Indians, for more than fifty years, derived from it -- the artificial meaning which might be given to it by the law and by lawyers.”

So we say here that the artificial meaning given by the Bureau of Internal Revenue and its solicitor to this treaty is a substitute for the natural meaning which here, as in the Seufert Brothers case, should contral.

The next and last case in which the Supreme Court has had occasion to construe the fishing clause of this treaty is *Tulee v. Washington*, 315 U. S. 681; 86 Law Ed. 1115, which case we submit is absolutely controlling here. That case originated in a criminal prosecution by the State of Washington against a member of the Yakima Indian Tribe for fishing in the waters of the Columbia River at a usual and accustomed place with a net, without first securing from the State a license and paying therefor an annual license fee of \$5.00. As we have noted, the defendant was represented in this case by the Department of Justice. The State Supreme Court, by a divided court, sustained a conviction of the defendant, and an appeal was taken to the Supreme Court of the United States. The decision of the State court was reversed for the reason that the imposition of this tax was held to be in conflict with the fishing rights reserved by the Indians in the treaty. The court said:

“In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will

bear. In *United States v. Winans*, 198 U. S. 371, 49 Led 1089, 25 S Ct 662, this court held that, despite the phrase 'in common with citizens of the territory,' Article 3 conferred upon the Yakimas continuing rights, beyond these which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area; and in *Seufert Bros. Co. v. United States*, 249 U. S. 194, 63 L ed 555, 39 S Ct 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States v. Kagama*, 118 U. S. 375, 384, 30 L ed 228, 231, 6 S Ct 1109; *Seufert Bros. Co. v. United States*, supra (249 US 198, 199, 63 L ed 558, 559, 39 S Ct. 203).

"Viewing the treaty in this light we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for 'the support of the state government and its existing public institutions.' Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing.

But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a pre-requisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case."

We have quoted from this decision in almost its entirety for the reason that it seems to us to determine entirely the question. We desire particularly to direct the court's attention to the statement made by the court that "from the report set out in the record before us of the proceedings at the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in *accordance with the immemorial customs of their tribes*". This is the report quoted from in the dissenting opinion of Justice Simpson in the State court. It is true that this report is not in this record, but this makes no difference. The Supreme Court of the United States has based its decision in part upon it and it is binding on this court. Also, we desire to emphasize the statement of the Supreme

Court that it is the responsibility of the court "to see that the terms of the treaty are carried out as far as possible, *in accordance with the meaning they were understood to have by the tribal representatives at the council* and in a spirit which generously recognizes the first obligation of this nation to protect the interests of a dependent people".

If, as the court said, the desire of the Indians was the right to fish in accordance with previous customs, and if it is the responsibility of the court to say that the treaty is carried out in accordance with that understanding, then certainly the right to tax this income should be denied. The taking of fish by the Indians from time immemorial was certainly not subject to the right vested in any white person or nation to impose a tax thereon. The treaty preserves that right, and certainly it cannot be said that it is in any way impossible to exempt from the right to impose income taxes, this small segment of the national income.

We have already shown that it is no answer to this to assert that the taking of fish is the only right protected, and that the right of sale was subject to the same Governmental rights as in the case of white persons with whom no treaty had been made, as did the Tax Court in its rather casual opinion. The right to take the fish of necessity involves the right to dispose of the fish when taken. Doubtless,

the Indians had on occasions bartered fish with fur traders and white settlers. We think the records of the pioneers of the Pacific Northwest will show many instances of such commercial transactions. Be that as it may, however, the treaty contained no limitations upon the exercise of dominion and control over the fish by the Indians when they were taken. To impute into the treaty a distinction between fish caught for home consumption and fish caught for sale is to place in the treaty a limitation not found there, and to controvert the statement in the *Winans* case that "the treaty was not a grant of rights to the Indians, but a grant of rights from them, -- a reservation of things not granted".

When the treaty was signed, the Indians had the right to catch the fish and sell them. When they reserved the right to take the fish, then certainly under any rule of construction, there went with that reservation the right to dispose of the fish. The *Tulee* case holds that this right cannot be subject to a charge attempted to be imposed by the State of Washington, partially for purposes of revenue and partially in the exercise of police power. The *Winans* case holds that the United States is subject to the same limitations as the State. Indeed, the violation of the treaty here is much more apparent and clear than in the *Winans* case. In the *Tulee* case the exaction complained of was nominal

in amount, was, in part at least, a part of the exercise by the State of its right under the police power to conserve the fish, and involved fish caught beyond the boundaries of the Reservation. Here, the exaction is substantial. There is no pretense of the exercise of the police power, but the action taken by the Government is avowedly for the purpose of raising revenues. It has been said that "the power to tax is the power to destroy". This axiom has been rather well demonstrated by recent decisions of the Supreme Court of the United States which have even justified treble taxation. If the Government may impose an income tax of 20%, it can impose one of 50% or 60%, with the net result that finally the fish can only be taken for home consumption, and even that may be made subject to a use tax.

In the foregoing discussion we have not overlooked the fact that these three cases involved the right to fish at usual and accustomed places beyond the borders of the Indian Reservation; neither do we overlook the fact that the treaty with the Yakimas specifically provided that the Indians had "the exclusive right of taking fish in all of the streams where running through or bordering said reservation," whereas this provision is not found in Article III of the present treaty. The reason for this probably was that in the case of the Yakimas, Article III specifically described the Reservation area,

whereas Article III of the Quinaielt treaty reserved for the use and occupation of the Indians, lands to be thereafter selected by executive order of the President. Since there was no specific reservation described in the Quinaielt treaty, the reservation of the right to fish at all usual and accustomed places was sufficient. It may be suggested, also, that Article III had the same effect as the provision in the Yakima treaty, because Article III provided that when the Reservation was selected, it should be "set apart for their exclusive use, and no white men shall be permitted to reside thereon without permission of the tribe and of the Superintendent of Indian Affairs or Indian Agent". The reservation of exclusive right of taking fish set out in the Yakima treaty. Such was the conclusion of District Judge Cushman of the Western District of Washington, who sat upon the District Court in this area for over a quarter of a century and was well-versed in Indian law, in the case of *Mason v. Sams*, 5 Fed. (2d) 255. We think, therefore, that the difference in language between the two treaties is a matter of no consequence and that the Tulee case is equally applicable to the Quinaielt treaty.

The only other reported decision which we have found which construes the fishing clause of these treaties is the case of *Mason v. Sams*, supra, which case is squarely in point on principle, although

perhaps not on the facts. That was an action brought in equity by members of the Quinaielt tribe to enjoin one Sams, who was then Indian Superintendent of the tribe, from enforcing certain rules and regulations regulating the taking of fish in the Quinaielt River which had been promulgated by the Department of the Interior. This regulation prohibited fishing in certain portions of the channel and with certain kinds of gear, and to a limited extent required fish to be taken personally by the owners of such fishing locations. Other regulations were made which are not too applicable here. The one concerning which the main complaint in the case was made, was a regulation which provided that all members of the tribe should be required to sell their fish to buyers licensed by the Department of the Interior, and that each licensed buyer should withhold from the gross proceeds of fish sold to him by members of the tribe, a graduated royalty which ranged from 5% on receipts from \$500.00 to \$1,000.00, up to 25% on receipts over \$3,000.00. The regulation further provided that this money should be remitted to the Department of the Interior and used for the care of the aged and destitute members of the tribe when authorized by Congress, or for other general agency purposes. It should be noted that Section 463 of the Revised Statutes authorized the Secretary of the Interior to make rules and regulations governing the Indians,

so there was not involved in the case any question of general executive authority to make regulations. These royalty provisions of the regulations were attacked by the plaintiff upon the ground that they violated Articles II and III of the treaty. The court first referred to the Winans and Seufert cases, *supra*, then compared the differences in language of the two treaties and held that the Quinaielt treaty should be construed as giving the exclusive right to fish upon the Reservation to members of the tribe. In the course of this conclusion, the court said that it took "judicial knowledge of the fact that at the time of making the treaty these Indians were particularly dependent for a living upon fishing—more so than were the Yakimas or any of the plains Indians," and it was thought by the court that this was so obvious to the framers of the treaty that this "may have been the reason that no express provision was made for exclusive rights upon the reservation."

The court then discussed the treaty in the following language:

"Under Articles II and III of this treaty the right to take fish was in the individual Indian—as much so as the right to pick berries, to gather roots, to hunt, or to pasture his ponies upon the open and unclaimed lands. The treaty can mean no less. Its language—and a common knowledge of the Indian's way of life—

render it plain that the Indians must have understood by this treaty substantially as found by the court."

After quoting from the Seufert case, the court continued:

"No intention is shown, nor implication warranted, that the Indian who fished should pay, from his fishing, the Indian who did not care to fish but chose, rather, to hunt, pick berries, gather roots, or run his ponies upon the public domain. It may be that in a case of tribal lands, or other property in excess of those required by individual members of the tribe, a different rule would obtain; but in the present suit it appears that part of the trouble is that there is not enough set-net locations to go around. The inconvenience arising from such a condition does not warrant a warped interpretation of the treaty. There are less arbitrary ways of meeting such a situation.

"Clubs of limited membership have a waiting list; upon a crowded golf course, players await their turn; the whole belongs to the one whose harpoon first strikes him. There is no analogy in this matter between the power of the government, and the authority of the state over the fish in its streams. The state owns the fish and the game of the state, and may regulate or license the right to take them, or forbid it entirely. But the fish in the waters of this stream do not belong to the state, nor to the United States; *but to the Indians of this reservation.*"

This case, we submit, is also squarely in point.

These regulations in effect placed a graduated gross income tax upon the income of the Indians which accrued from the taking of this fish. The fact that the proceeds were to be used for agency purposes or for the support of destitute members of the tribe would not differentiate the case from the one here involved. The question before the court was a question of whether or not the treaty was intended to prohibit the imposition of a financial burden by the Government upon the right of the Indians to catch and sell this fish. The court construed the treaty as prohibiting such action. If a gross income tax, to be set aside for the benefit of the Indians, was a violation of the treaty, then certainly a net income tax to be used for general Governmental purposes is even more plainly such a violation. It is significant that the Indian Department did not even seek a review of this case by this court, although a perpetual injunction was issued in the case. This is probably the reason why, since that time, the department has permitted the Indians to sell this fish to any person and to use the proceeds as they see fit.

As we have indicated, the Quinaielt treaty has been before the United States Court on two occasions. The first case was the case of *United States v. Payne*, 264 U. S. 446; 68 Law Ed. 782. This was a suit brought by a member of the Quilleute tribe

to determine his right to an allotment of an eighty-acre tract of timber land in the Quinaielt Indian Reservation. The Government contended that, since the general allotment act provided that there should be allotted to the members of the tribe such lands as "may be advantageously utilized for agricultural or grazing purposes," the plaintiff was not entitled to an allotment of timber lands. The court rejected this contention, holding that a liberal construction of the treaty required a different conclusion. Among other things, the court observed: "It follows that if the allotment act is now construed to exclude such lands from allotment, a materially restrictive change would have been wrought in the terms of the treaty. Such a construction is to be avoided if possible."

It is not contended that the facts in that case have anything to do with the exercise of the power of taxation, but the decision does construe the treaty for the benefit of the Indians, in the face of seemingly specific language in a general statute governing the same subject matter. The logic of the case would certainly seem to support the proposition that the broad language of the Internal Revenue Act should not be construed in such a way as to substantially burden the ancient fishing rights which the Indians reserved in 1855.

This treaty was again considered by the Su-

preme Court of the United States in the case of *Halbert v. United States*, 283 U. S. 751; 75 Law. ed. 1389. That case involved the following situation: Article II of the treaty provided that the Indians reserved for their use and occupation a tract to be designated by executive order, which should be "sufficient for their wants." As was noted in the opinion, on November 4, 1873, the President by executive order established the Quinaielt Indian Reservation, which contained about 200,000 acres and which included a prior provisional reservation of 10,000 acres. Later, by the Act of March 4, 1911, Congress directed the Secretary of the Interior to make allotments on the Reservation "under the provisions of the allotment laws" to all Indians who were affiliated with the Quinaielt tribe. The plaintiffs in the case were of Indian blood and descent, but none of them were members of the Quinaielt tribe and many of them did not reside on the Reservation. Notwithstanding the fact that the general allotment laws of the United States did not make the plaintiffs eligible for an allotment, it was held that personal resident on the Reservation was not necessary to secure an allotment, and that persons of mixed blood had the right to participate. Judgment was, therefore, entered for the plaintiffs.

It is not contended that there is any similarity between the facts in the case and the present action.

The decision, however, does again enunciate the rule that Indian treaties will be most liberally construed to the benefit of the Indians, and *that general statutes will not be construed as intending to modify or limit rights previously granted by an Indian treaty.*

We have attempted to establish the proposition by the foregoing argument that this treaty was intended to prevent the imposition of any tax upon either the taking of fish from the waters of this river or upon the sale of fish so taken. It may be suggested that Congress has the power, by statute, to repeal or modify an Indian treaty and that, therefore, the Internal Revenue Act under which this tax was imposed should be so construed. There are two answers to this suggestion, if it is made. The first answer is as we have stated before, that the court will not construe a general statute as intended to impliedly modify or limit the provisions of a treaty. The cases of *Halbert v. United States*, supra, and *United States v. Payne*, supra, definitely establish this principle. In addition to these cases, we direct the court's attention to *United States v. Powers*, 305 U. S. 527; 83 Law Ed. 331. In that case it was held that the right to persons acquiring through Indian Allottees lands formerly a part of the Crow Indian Reservation and set apart by treaty, to divert water from streams within the

Reservation, was superior to the general right of the Government to divert water for irrigation projects. The Government contended that because the Secretary of the Interior was authorized by general statute to initiate irrigation projects on Indian reservations, that the right of the Indians was modified. This was answered by the court in the following language:

“We find nothing in the statutes after 1868 adequate to show congressional intent to permit the allottees to be denied participation in the use of waters essential to farming and home making. *If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purpose.*”

As we shall hereafter show, the reason why an executive practice by the Bureau of Internal Revenue, of over twenty years duration, which was based upon at least four opinions of the Office of Attorney General of the United States, was reversed, was on account of what was thought to be the law announced in the case of *Five Civilized Tribes v. Commissioner*, 295 U. S. 418, 79 Law Ed. 1517, generally known as the “Sandy Fox Case.” We shall have occasion to discuss that case more extensively hereafter. Insofar as the present point is concerned, it may be said that the court there held a certain type of income which accrued to a restricted Indian, subject to an income tax,

there being no treaty provisions which gave immunity from taxation. At the same time, however, the court said:

“The general terms of the taxing act include the income under consideration and if exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs.”

In other words, the opinion indicates quite clearly that had the particular income there involved been protected from taxation by treaty, then a different conclusion would have been reached. Similarly in *Choteau v. Burnet*, 283 U. S. 691; 75 Law Ed. 1353, the court, in holding that certain income accrued to a competent Indian from royalties upon oil and gas leases of tribal lands, was taxable, observed:

“No provision in any of the treaties referred to by counsel has any bearing upon the question of the liability of an individual Indian to pay taxes upon income derived by him from his own property.”

By necessary implication, then, the court held that had there been such an exemption, then a different conclusion would have been reached.

Even if it be concluded that Congress intended by the passage of the Internal Revenue Act to modify this clause of the treaty, as construed in

Tulee v. Washington, supra, it may, nevertheless, be doubted whether such power existed under the doctrine announced by the Supreme Court of the United States in *Choate v. Trapp*, 227 U. S. 665; 56 Law Ed. 941. That case involved an agreement entered into with representatives of the Government and the tribes for the extinguishment of Indian title to certain lands in the Oklahoma country and for the allotment of lands to the members of the tribe, and provided specifically that the lands so allotted "shall be non-taxable while the title remains in the original allottees." On May 27, 1908, Congress passed a general statute removing all restrictions from the sale of these lands by the Indians and provided further that the lands from which the restrictions had been removed should be subject to local taxation. Thereupon, and under this Act, Oklahoma sought to tax the lands. The court held the law to be void under the Fifth Amendment to the Constitution of the United States, stating that the exemption "was a vested property right which could not be abrogated by statute."

It may be admitted that this case is apparently in conflict with the case of *The Cherokee Tobacco*, 11 Wall. 616, 20 Law Ed. 227. In any event, the Choate case was decided by a unanimous court almost forty years after the Cherokee case and must

be deemed to be controlling. The court will find an excellent discussion of this case in "Handbook of Federal Indian Law" by Felix S. Cohen, which was printed by the public printer in 1941. The question is discussed at page 265 of this book. It might be observed that the volume bears upon the title page the words, "United States Department of the Interior, Office of the Solicitor." and that Mr. Cohen was chairman of the Board of Appeals of the Department of the Interior, and that written introductions by Secretary of the Interior Harold L. Ickes and Solicitor Nathan R. Margold are therein contained.

We have not found any decision of the United States Supreme Court in which the authority of the Choate case has been denied. We submit, therefore, that irrespective of questions of statutory interpretation of the Revenue Act, petitioners, under the treaty, acquired a vested right to these fish and that this vested right could not be impaired by the Congress under the provisions of the Fifth Amendment.

**The Imposition of This Tax Is Not Authorized
By the Revenue Act Even Though There Is No
Express Exemption In The Treaty**

In the preceding portion of this brief we have sought to establish the proposition that the treaty

should be construed as exempting this type of income from an income tax and that, therefore, (1) it should not be deemed modified by implication by the Revenue Act, and (2) that in any event, under *Choate v. Trapp*, supra, a vested right was created which could not be impaired by subsequent legislation. Even, however, if the court concludes that there is not contained in the treaty any exemption from taxation and distinguishes *Tulee v. Washington*, supra, in some manner, it is nevertheless submitted that under proper rules of construction and long-settled executive practice, the court should not construe the provisions of the Revenue Act as intending to apply to this type of income. The basis of this position arises out of the facts and circumstances which we have related, and the peculiar relationship between the Indians and the Government. We intend to examine this question in the light of previous executive practice and judicial decision, and then inquire whether that practice and those decisions must necessarily be overruled by the Sandy Fox case.

We refer, therefore, first to executive practice. The evidence in the case shows that no attempt has ever been made to collect this tax by the Bureau of Internal Revenue during the entire period from the passage of the first Revenue Act to 1943, except in 1923 when an attempt was made to col-

lect the tax, which was immediately thereafter followed by a reversal of position by the Government. We do not have available complete Governmental records showing the full course of Government construction. However, the entire picture seems to be fairly accurately set forth in a number of decisions of the attorney general of the United States, which officer is the ultimate legal adviser of both the Bureau of Internal Revenue and the Department of the Interior. This matter was considered in detail by Attorney General Harry M. Dougherty in an opinion given to the Secretary of the Treasury on March 15, 1924 (34 Op. Att. Gen. 275). In that case it was held that income received by individual members of the Five Civilized Tribes from tax-exempt lands allotted in severalty, was not subject to taxes imposed by the Revenue Acts of 1916 to 1921, inclusive. This opinion, as we read it, was based not only upon the proposition that exemption from taxation had been theretofore created by express agreement, but upon the general idea that the nature of the relationship between the Government and non-competent Indians precluded a construction of the Revenue Act which called for the collection of the tax.

It may be admitted that the opinion is, to a certain extent, obscure upon this last point, but it seems to have been so understood by Mr. Dough-

erty's successor in office, Harlan F. Stone, later a member of the Supreme Court of the United States. On August 14, 1924, Attorney General Stone wrote an opinion to the Secretary of the Interior (34 Op. Att. Gen. 302), in which it was held that claims for the return of funds which the Indian Superintendent had disbursed in payment of income received from tax-exempt lands should be refunded, irrespective of the general statute of limitations. The opinion of Attorney General Stone refers specifically to the previous opinion of Attorney General Dougherty and states: "The Attorney General there considered at length the relationship between the Indian and the Federal Government and discussed the paternalistic attitude of the Federal Government toward its dependent wards and its control over their property and income."

Whatever may have been the real basis of the original opinion of Attorney General Daugherty, it was squarely held in an opinion of Attorney General John G. Sargent, dated March 20, 1925, directed to the Department of Justice (34 Op. Att. Gen. 439) that the Internal Revenue Act did not apply to income from allotted lands. In that opinion it was held that rents, royalties, or other income of the Quapaw Indians derived under leases, or otherwise, from their allotted lands during the restricted period, were not subject to Federal

income tax law. The opinion first dicusses the circumstances of the treaty with the Quapaws. Unlike the treaty with the Five Civilized Tribes, this treaty contained no exemption from taxation. After reviewing the treaty, Attorney General Sargent said:

“It is obvious from the poverty-stricken condition of these Indians and the circumstances surrounding their removal to the land now in question that taxation of said land at that time was not contemplated. Taxation then would have meant destruction. Moreover, the lands relinquished by the Indians had not been subject to taxation or interference in any way by the Federal Government.”

So in the case at bar. It is obvious from the condition of these Indians, as revealed by the correspondence between Col. Simmons and Governor Stevens, that taxation of this fish was certainly not contemplated. It is also true that here, as there, the Indians had not theretofore been subjected to taxation by the Government. After reviewing numerous decisions, Attorney General Sargent concluded:

“True, the Federal Income Tax Statutes are in broad compass and impose a tax upon the entire net income of ‘every individual.’ Section 1(a), Revenue Act of 1916, 39 Stat. 756; Section 210, Revenue Act of 1918, 40 Stat. 1057; Section 210, Revenue Act of 1921. 42

Stat. 227; Section 210, Revenue Act of 1924, 43 Stat. 253. No specific reference, however, is made in these Acts to Indians and their property. We have seen that none of the treaties or statutes dealing with the Quapaw Indians contains and provision subjecting their lands to State of Federal taxation. On the contrary, by the Quapaw Allotment Act Congress, instead of providing a way to compel the Indians to contribute out of their property to the support of the Federal Government, immediately concerned itself with a provision of law securing to them the continued possession and enjoyment of their lands by making the same inalienable. In order to make this restriction against alienation properly effective, it would seem that inalienability and nontaxability should go hand in hand, at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property, the management and control of which, rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.

“Therefore, in the absence of clear congressional authority to that effect, I am of opinion that the income from the restricted lands of the Quapaw Indians is not subject to the Federal income tax law.

"The opinion of the Attorney General of March 15, 1924, relative to the taxability of the Five Civilized Tribes, is largely applicable to the question here presented."

This opinion was adhered to in the opinion of Attorney General John G. Sargent dated November 11, 1925, to the Department of Justice (35 Op. Att. Gen. 1). That opinion involved a treaty with the Kaw Indians which had an express exemption from taxation, but Attorney General Sargent holds specifically that the tax should not be collected, irrespective of this treaty, and then adds a second and, as he states, "an additional reason" to the effect that the agreement exempted the lands from tax. In the opinion he also said:

"It is to be presumed that Congress has not intended to violate that compact and there is nothing in the general provisions of the Federal income tax statutes to overcome this presumption."

These opinions were referred to and re-affirmed by Attorney General Sargent in an opinion dated June 24, 1926, addressed to the Department of Justice, (35 Op. Att. Gen. 107), involving the question of whether an Indian living on non-allotted lands on a reservation was required to pay an income tax upon income derived from the purchase of cattle, and other business, on the reservation. The power to tax was denied for the stated reason that:

"To tax them is so inconsistent with the purposes and object of the Government in its dealing with these Indians, and the relation that it maintains toward them and their property, that it can not be assumed from the general provisions of the internal revenue laws, although broad in compass, that such was the intention of Congress."

From these references it plainly appears that the executive construction of the Revenue Acts by the executive department was uniform and that this construction denied the power to tax, and that seems to have been the universal practice of the Government until the Supreme Court of the United States decided the Sandy Fox case, *supra*, because on September 27, 1937, Attorney General Homer Cummings addressed a nine-line opinion to the Secretary of the Interior (39 Op. Att. Gen. 107), which opinion reads as follows:

"The decision of the Supreme Court in *Superintended v. Commissioner*, 295 U. S. 418 (May 20, 1935,) that income on funds derived from the restricted allotment of a full blood Creek Indian which are in excess of his needs and are held by the United States in trust for him, is subject to the Federal income tax, must prevail over the contrary conclusion reached in the Attorney General's opinion of March 20, 1925 (34 Op. 439), regarding the taxability of income from restricted lands of the Quapaw Indians."

This opinion was apparently the basis of the change in attitude of the executive department of the Government, although the reasons why the Government waited from 1937 to 1943 before it attempted to collect income taxes from the members of this particular tribe, are obscure.

It is significant that during this period of time a number of income tax statutes were passed. There is no doubt but that Congress was informed of these rulings of the Office of the Attorney General. Yet we have not found that any amendment to any of the income tax laws was ever suggested which would specifically make this form of income subject to taxation. During this period, the decisions of the lower Federal courts, although not numerous, denied the power to tax. It is unnecessary to review these cases in detail, since the reasons given were in substance the reasons set forth in the opinions of the Attorney General to which we have referred.

Choteau v. Commissioner, 38 Fed. (2d) 796, commonly known as the "Blackbird Case," is a good illustration of this class of cases. That case involved an attempt made by the Commissioner of Internal Revenue to impose income taxes, (1) upon a member of the Osage tribe of Indians, who had not received a certificate of competency, upon income accruing from allotted lands, and (2) upon income

accruing to a white woman who had inherited from her children who were members of the tribe, and (3) income accruing to one Choteau, a member of the tribe who had received a certificate of competency. The Board of Tax Appeals affirmed the levy of a deficiency tax upon all of these Indians. The ruling was affirmed as to the white woman and the competent Indian, but reversed as to the restricted member of the tribe. The basis of this conclusion was the opinions of the attorney general which was have referred to. The subsequent course of this litigation is rather interesting. Choteau, an unrestricted Indian, who was the unsuccessful litigant before the Board of Tax Appeals and before the Circuit Court, procured a writ of certiorari to the Supreme Court of the United States from this decision. It is significant that the Government did not seek to have that portion of the decision which announced immunity from taxation upon the part of the restricted Indian reviewed. The decision sustained the power to tax, in general language. The decision is not authority upon which to predicate the assertion that the right to tax restricted Indians upon this type of income exists.

Other cases which more or less sustain this view are as follows: *Richards v. United States*, 21 Fed. (2d) 94; *Lewellyn v. Cononial Trust Co.*, 17 Fed. (2d) 36; *Bagbzy v. United States*, 60 Fed. (2d) 80; *Pitman v. Commissioner*, 64 Fed. (2d) 740.

From this resume it will be observed that both executive and judicial construction support the idea of immunity. Apparently, the subsequent action of the various Governmental departments was based upon a misapprehension of the scope of Attorney General Cummings' review of the decision in the Sandy Fox case. The opinion contradicts itself. It first states that under the decision in the Sandy Fox case, income on invested funds which originate from an allotment and which are in excess of the needs of the Indian, is subject to the Federal income tax. To that extent, the opinion makes a correct statement of the law, as laid down in the Sandy Fox case.

It is then stated, however, that this "must prevail over the contrary conclusion reached in the attorney general's opinion of March 20, 1925, regarding the taxability from restricted lands of the Quapaw Indians." The opinion of the attorney general there referred to involved an attempt to tax the income derived from allotted lands. It did not involve the question of the right to tax incomes derived from the investment of surplus income, which was the only question decided in the Sandy Fox case. It would seem, in view of the careful and elaborate discussion by the predecessors in office of Attorney General Cummings, including Justice Stone, that the question should have been more

carefully examined, because the Sandy Fox case did not decide the question here involved, nor has the question ever been decided by the Supreme Court of the United States. The Sandy Fox case, insofar as the Federal courts are concerned, originated in a petition to review a decision of the Board of Tax Appeals which held that income derived from the investment of surplus income contained in an Indian's allotment was taxable under the Revenue Act. The Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals (75 Fed. (2) 183). The opinion was by a divided court, the majority opinion being written by Circuit Judge McDermott.

It is unnecessary to quote this whole decision, but it may be pointed out that the majority opinion very carefully distinguished between income derived directly from an allotment and income derived from the investment of surplus income. This is made apparent from the portion of the decision in which the court reviews certain decisions of the Board of Tax Appeals. The court called attention to the fact that in *Snell v. Commissioner*, 10 D. T. A. 1081, the Board of Tax Appeals had held that income from the investment of income was subject to an income tax, but that in 1929 in the case of *Blackbird v. Commissioner*, 38 Fed. (2d) 976, the court reversed the Board of Tax Appeals in its attempt

to include within the scope of the Snell decision income from an original allotment. The opinion also calls attention to the fact that after the decision in the Blackbird case, regulation G.M.C. 9621 was adopted by the Commissioner "under which restricted Indians are exempted from tax from such incomes as are dealt with in the Blackbird case, *but taxed upon incomes from investments of incomes.*"

The court then called attention to the fact that subsequently Congress had twice re-enacted the income tax law and had not disturbed this departmental ruling, and also called attention to the fact that Congress by a joint resolution had recognized the soundness of this ruling. The opinion then concluded:

"Congress is therefore familiar with the distinction between income from the original heritage of the Indian and other income. There is, moreover, a reason for the distinction. The income from the allotments of many or most of the Indians is barely sufficient to support them; but oil was discovered upon the allotments of some, and those received an income much larger than their needs; when that surplus was invested and in turn produced income, there is reason in requiring such wealthy Indians to contribute to the cost of the government whose services they enjoy. In the fact of this history, we conclude that Congress is content with the administrative interpretation of its acts."

This language is equally applicable to the members of the Quinaielt tribe. Certainly under this record, the meager income which the members of this tribe receive from the taking of this fish, which is the tribal property of the tribe, is hardly adequate for subsistence, and therefore, under the decision is exempt from tax.

We have gone into the history of this case, both before the Board of Tax Appeals and before the Circuit Court of Appeals of the Tenth Circuit, with some particularity so that the rather dogmatic language of Mr. Justice McReynolds in *Five Civilized Tribes v. Commissioner*, 295 U. S. 418; 79 Law Ed. 1517, can be more understood. As we have noted, the Circuit Court, by an elaborate opinion, very definitely restricted the scope of its decision to income arising from the investment of surplus funds, and in express language held that this conclusion did not apply to "income from the original heritage of the Indian." The decision of the United States Supreme Court occupies about a page and a half, of which three-fourths is composed of quotations. It may be admitted that there is language in the decision, if taken literally, which supports the power to tax any income of restricted Indians where there has been no treaty or agreement creating a tax exemption.

If the case is read in its entirety, however, it

seems to us that, although it was somewhat carelessly written, in view of the very serious importance of the question, that it did reserve this question. The opinion starts with the statement that Sandy Fox was a full-blood Creek Indian and that "Certain funds, *said* to have been derived from his restricted allotment in excess of his needs were invested. The proceeds therefrom were collected and held in trust under direction of the Secretary of the Interior. The question now presented is whether this income was subject to the Federal tax laid by the 1928 Revenue Act." It is difficult to understand the statement of the court, that these funds were said to have been derived from excess moneys which had been invested. As we understand it, this fact was agreed to by both parties in the court below and in the Supreme Court. It was not contradicted that this invested money was money which the Government, as trustee, had invested, after allotting to the Indian an amount deemed adequate for the support of the Indian. According to the opinion of the Circuit Court, the income derived from such invested savings amounted to \$16,149.18 in the year in question. Certainly, then, there was no doubt concerning the facts. It is also significant, as appears from the opinion of the Circuit Court of Appeals, that when the superintendent of the agency made his return to the Government for the Indians, that the only return which he made was

the income derived from such invested savings. Insofar as we are informed, he made no return covering the income from the allotment which was not available for investment. Neither the Commissioner nor the Board of Tax Appeals seems to have questioned the propriety of this action.

The opinion then sets forth a quotation from the Blackbird case having to do with the taxability of income received by a restricted Indian from allotted property, in which the power to tax had been denied, and from which decision the Government had not appealed. Mr. Justice McReynolds then states that that quotation did not harmonize with what had been said by the Supreme Court in *Choteau v. Burnet*, 283 U. S. 691, 75 Law Ed. 1353. This statement, as we have shown, was inaccurate, to say the least. The Choteau case was an appeal by a non-restricted Indian in the Blackbird case. The court in the Choteau case very carefully avoided passing upon the question in Blackbird's case which had been decided by the Circuit Court of Appeals and from which decision the Government did not appeal. Mr. Justice McReynolds then observed that: "The Court below properly declined to follow its quoted pronouncement in Blackbird's case." It is difficult for us to appreciate the basis of this statement. As we have shown, the court below referred with express approval to its previous decision in

the Blackbird case and distinguished it, and held that there was a substantial difference between income accruing from the investment of surplus funds and income arising from an allotment and used by the Indian for subsistence purposes.

From this it will be seen that Mr. Justice McReynolds was not called upon to decide the question of whether the ruling with respect to Blackbird was correct or was not correct. As we have shown, that question was not before the court. While the first portion of the opinion is very broad and perhaps inconsistent with our position, if the court will read the next to the last paragraph, it will be seen that the ultimate question was finally saved in the decision. It was there said:

“Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship *that exemption is a necessary implication.*”

The court did not say that taxation of income arising directly from an allotment was not necessarily inconsistent. The implication from the decision is that there might be instances in which it would be held that such taxation was so inconsistent with the relationship that exemption is a necessary incident. We submit, therefore, that this case is not controlling and that the present position of the Indian Department and the Commissioner, based

solely upon the Sandy Fox case, is not justified by that decision.

If we consider this case from the standpoint of principle, it seems clear to us that in the light of the history of this treaty and the peculiar geographical position of the Quinaiaelt tribe, that this taxation is inconsistent with this relationship. As we have shown, these Indians have but two sources of income, outside of the bounty of the Government, and these are the sale of the timber and the catching of the fish. Timber can only be marketed in accordance with general developments in the logging industry, i. e., a tract of timber cannot be sold to advantage until logging developments in the area make it profitable for a prospective purchaser to buy and log the timber. The necessary result of this is that many of these allottees have received nothing from their timber and will not until that timber is logged, which may be many years hence. They do, however, rely upon the fish of this river to a substantial extent to aid them in procuring the bare necessities of life. The situation here is in no way analogous with the situation in the Oklahoma country where huge oil fields were discovered and developed on the lands of the Indian allottees, and by reason thereof, huge sum accrued, far in excess of the primary needs of the Indians.

It is a familiar axiom of the law that bad cases sometimes make bad law. It is quite easy to understand why the Supreme Court, in the Sandy Fox case, when confronted with the claim of an Indian that some \$16,000.00 in one year of surplus income was exempt, should have denied the exemption. An argument based upon this theory of relationship, as was adequately pointed out in the opinion of the Circuit Court in the Sandy Fox case, depends upon the practical necessities of the situation, and as was stated, there was a reason to require wealthy Indians to contribute to the support of the Government, even though the income, from a technical standpoint, could be traced back to their ancestral allotment, which would not apply, however, to subsistence income. Here, however, there is no such situation. There are probably not as many fish in this river today as there were in 1855, whereas, upon the other hand, the material wants of the members of the tribe have increased. For a guardian to take from a ward such a type of income is certainly inconsistent with the relationship, and should not be done, save pursuant to express Congressional mandate. We submit that this is an original question insofar as the Supreme Court of the United States is concerned and that it should now be decided upon the merits.

**This Money Represented The Sale of a Capital
Asset And Was Not Income**

It may be admitted that the formula which was adopted by the Commissioner with respect to this income was the ordinary formula which is followed in taxing the proceeds of an ordinary commercial fisherman, i. e., there was first ascertained the gross revenue received, then there was deducted from that item all necessary expenses involved in the taking of the fish, and the difference was declared to be net income. This case, however, involves unique circumstances which, we submit, distinguishes it from the ordinary case. The courts have uniformly held that, insofar as our white populations are concerned, title to wild game and fish is reserved to the sovereign until such time as a citizen reduces the fish or game to passession, *Geer v. Conencticut*, 161 U. S. 519, 40 Law Ed. 793.

As is pointed out by Judge Cushman in *Mason v. Sams*, supra, this is not the rule with respect to this fish, because as he said, "The fish in the waters of this stream do not belong to the State nor to the United States; but to the Indians of the Reservation". The Indians as a tribe reserved title to the fish. If ever a property constituted, and still does constitute, a capital asset, this fish certainly is an

asset of that description. In earlier days it was something without which the Indians would have perished. Even in this modern age it is still a substantial factor in the welfare of this tribe. It should be remembered that there is not involved here the sale of processed fish in commercial channels. The stipulated facts show that these fish were taken from the waters of this river in their natural state and were immediately sold to fish buyers who then processed them into cans and thereafter sold them to the trade.

The Indians had two capital assets, timber and fish. In another case which may soon be presented to this court, the Government has sought to tax capital gains alleged to have accrued to the members of this tribe from the sale of allotted timber. We submit that there can be no difference, in view of the peculiar circumstances of this case, between the sale of timber and the sale of fish. If the sale is treated as the sale of a capital asset, then there can be no tax because there is no proof to sustain the application of any theory of a capital gain, nor does the Commissioner seek to impose the tax upon that theory.

**The Government Is Precluded In Any Event From
Seeking To Impose Taxes For Any Years Prior
To 1943**

This point would only be material should the

court overrule the contentions which we have heretofore made. We have previously shown in this brief that for a period of many years these Indians were advised by their Indian Agent, who was, in effect, their guardian, that it was not necessary to file returns or to pay taxes on this type of income. It further appears that these instructions were given to the Indians pursuant to the instructions of the attorney general of the United States, a member of the President's cabinet and the legal advisor of all branches of the Government. It further appears that the moneys which accrue from the sale of this fish is most variable and uncertain and that only at considerable intervals is there sufficient fish in the river to justify commercial fishing (Tr. page 52-55).

We have shown by the decisions that the relationship between the Government and the Indians is unique and peculiar, perhaps even greater than that between guardian and ward. We appreciate quite well the general rule of law that the unauthorized act of a public official cannot be used as an estoppel to prevent the governmental agency involved from enforcing a proper law. This case, however, is not of that character. The Government, through its authorized agent and under authority of its highest law officer, advised these Indians that this income was not subject to tax, and while the

record does not show this, we think that it is safe to assert that few, if any, of these Indians by 1943 had any of the proceeds of the 1941 fishing season available for the payment of any retroactive tax. The record shows that 1942, 1943, and the present year were substantial fishing failures.

This view seems to find support in the opinion of Attorney General Stone, given to the Department of Justice on August 14, 1924, and to which we have before referred in another connection. (34 *Op. Att. Gen.* 302). As we have noted, the attorney general's office had held that certain moneys accruing to the Indians were not subject to Federal income taxes. The superintendent of these tribes had made returns for them and had paid from trust funds, income taxes to the Internal Revenue Bureau. The statute of limitations provided that claims for refunds must be filed within five years. When it was discovered that the income was not taxable, claims were filed but in many instances, five years from the time the taxes were paid or assessed. The question determined by Attorney General Stone was whether the statute of limitations applied. It was determined that it did not. It was said:

"It goes without saying that the superintendent of the said tribes is an instrument of the Government officially functioning to execute the Government's policy toward the Indians under the superintendent's supervision."

It was further stated that if the superintendent failed to discover the irregularity of his action within the five-year period,

“The Indian is not to blame for this, and, if the Government could take advantage of the mistake of its own agent in this respect, it could go just one step farther and in the interest of its revenue instruct the superintendent to allow such claims to lapse. It is needless to rule that such a practice would be repugnant to our conception of a just and fair Government’s policy toward this dependent people.”

We do not assert that if the law is as claimed, the rulings given by the attorney general of the United States and reiterated to the Indians by the Indian Agent, would preclude a present reversal of that ruling and the future collection of taxes by the Government from the Indians. Such a contention would involve the attempted invoking of an estoppel based upon the unauthorized act of a public officer. This, however, is quite a different situation. Here, the Indians made no return and made no provision for the payment of taxes upon this income, because they were advised by the very government which now demands the tax, that they did not have to pay the tax. If the Government can impose taxes for 1941, it can impose taxes for 1915 or 1916, because, as we understand it, the statute of limitations does not begin to run until a return is filed. We have no appropriate authority for this

point other than the opinion of Attorney General Stone. The circumstances are unusual and they justify the application of a just and equitable rule of law. If the Government wins and collection is rigorously insisted upon, then bankruptcy will ensue for many members of this tribe; and if there is bankruptcy and the meager assets of the Indians are taken to pay the tax, then immediately the Government, as the guardian of these Indians, will render assistance for the necessities of the Indians probably many times in excess of any possible tax which could be collected. We appreciate the fact that ordinarily reasons of necessity are not good reasons in law. We do not refer to this with that motive. They are referred to so that there may be appreciated the absurdity of a contrary construction. The courts have not hesitated to protect the rights of Indians, without much regard to technical rules of law. This, we submit, is such a situation. There can be no doubt but that if the total proceeds realized by these Indians from the sale of the fish over a period of years were averaged over the years, then there never would be any taxable income under any theory and this case would not be here.

We submit that the Government should be bound by the deliberate action of its highest officers and that certainly the repudication of these actions,

based upon some broad language of Mr. Justice McReynolds, the construction of which is certainly subject to argument and which in any event was dictum, should not permit this act of injustice to be sustained, whatever may be the future action of the Commissioner.

Respectfully submitted,

L. L. THOMPSON

L. B. DONLEY

Attorneys for Petitioners

Address: 1410-24 Puget Sound Bank Building,
Tacoma, Washington

Appendix

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that the following facts are true and may be considered by the court as evidence in this proceeding:

1. Petitioners, Charles Strom and Flora Strom, during the taxable year 1941, were and for many years last past have been husband and wife residing together as such in the town or Indian village of Taholah, Grays Harbor County, State of Washington, which town is situated wholly within boundaries of the Quinaielt Indian Reservation. The Quinaielt Indian Reservation is an Indian Reservation located, lying and being wholly within Grays Harbor and Jefferson Counties, Washington. The boundaries thereof are correctly shown in the attached map of the Olympic Peninsula of the State of Washington which said map is marked as Joint Exhibit 1-A and made a part hereof. No Federal tax returns have been filed by petitioners for the taxable year 1941.

2. The petitioner Charles Strom is an Indian of full blood of the age of fifty-four (54) years, and was born at LaPush, Washington. He is a

member of the Quinaielt Indian tribe and has resided on the Quinaielt Indian Reservation at Taholah, Washington for a total of about forty-four (44) years. Petitioner Flora Strom is $\frac{1}{4}$ degree Quinaielt Indian.

3. The Quinaielt Indian Reservation has as its westerly boundary the Pacific Ocean. The Quinault River flows from Lake Quinault on the Easterly end of said reservation in a Westerly direction, emptying into the Pacific Ocean at the said village or town of Taholah, Washington. During the spring and fall seasons there are runs of fish up the said river and to the said lake. From time immemorial the Quinaielt Indians and allied tribes have taken fish from the said Quinault River for their own use and, in later years, for sale.

4. For many years prior to 1911 pursuant to the Tribal customs and practices of the Quinaielt Indian tribe certain Indians were allotted by the Tribal leaders, the exclusive right of taking fish from certain areas on the Quinaielt River and in the lower or Western Fifteen (15) miles thereof. About the year 1911, or subsequently, the Department of Interior of the United States of America, acting by and through the United States Indian Service, began allocating to certain Indians, in accordance with said Tribal custom and usage, certain exclusive locations for the taking of fish from the

said river. On April 9, 1919, E. B. Merritt, Assistant Commissioner of the Office of Indian Affairs of the United States of America promulgated certain regulations for governing fishing on the Quinault river. A full, true and correct copy of said regulations is hereto attached and marked as Joint Exhibit 2-B and made a part hereof.

5. Since the date of the decision of the United States District Court for the Western District of Washington, Southern Division, rendered in the year 1925 in the case of *Mason v. Sams*, reported at 5 Fed. (2d) 255, the Indians on the Quinaielt Reservation have established their own regulations governing fishing operations in the various streams and lakes thereon, which practices have since been conducted without any Federal, State or administrative interference or supervision outside the tribe. Thereafter the sole control and government of fishing rights and practices on the Reservation has been under the direction of the Quinaielt Indian tribe acting by and through its Tribal Council.

6. The Quinaielt Indian Tribal Council thereafter adopted the aforesaid regulations, Joint Exhibit No. 2-B, in their entirety save and except from time to time the same have been amended in matters relative to the fishing seasons and the gear to be used. In all other material respects said regulations have been and are enforced by the Quin-

aielt Indian tribe acting by and through its Tribal Council with the aid of what is known as the Channel Police of said tribe.

7. Pursuant to said rules, regulations, Tribal customs, usages, orders and regulations adopted by the said Tribal Council, certain, but not all of the charted fishing locations on the Quinault River have been, during the year 1941, and now are allotted and assigned for the use of certain individual members of the said tribe. There is attached hereto marked at Joint Exhibit 3-C and made a part hereof a blueprint made in 1932 showing the locations of seventy-eight (78) of such fishing locations, as they existed in 1916. For many years last past, and during the year 1941, Charles Strom and his wife have been recognized as having the exclusive right to use and to take fish during proper seasons and with proper gear from location No. 7 as shown on the said blueprint. Said fishing location No. 7 at all times since the creation of said reservation has remained as common Tribal property not allocated, and is subject only to the rights of use granted by the Tribal Council to the said Charles Strom and wife.

8. Said fishing locations are on both sides of the Quinault River and each is 255 feet in length. There are similar fishing locations within said reservation on the Queets River (see Joint Exhibit No.

1-A) which said fishing locations are also governed by the similar Tribal regulations. The size of locations, gear usable, and fishing seasons on the Queets River, however, differ from those pertaining to the Quinault River.

9. The matter of allocation of these several fishing locations were, in the beginning, based upon Tribal members taking over certain grounds which were recognized as being exclusive locations of such Tribal members. Under Tribal rules, regulations, and customs, and the orders of the Tribal Council, such fishing locations may be assigned to other persons or may pass, upon death of a holder of such a location, to his family, with the limitation, however, that such fishing locations may only be assigned or passed to members of the tribe who maintain a home upon the reservation. Such fishing location must be fished at least once each year in a businesslike manner, failing which such locations are deemed by Tribal custom to have been abandoned.

10. Under Tribal rules, regulations and customs, fish taken from such locations may be sold only to persons licensed as Indian traders. Licenses to Indian traders are issued by the Indian Agency subject to the approval of the Tribal Council of said tribe. After purchasing fish the Indian traders are at liberty to dispose of them in any manner

they deem advisable, either on or off the reservation and at such market as they may desire.

11. During the year 1941 the Mohawk Packing Company of Moclips, Washington, was issued an Indian fish buyers license and during that year bought fish taken from such locations through their agent, Cleveland Jackson, who then was and now is a member of the Quinaielt tribe residing on said reservation. The Mohawk Packing Company has a plant located at Moclips, Washington which is located near to but is not located upon said reservation. The Mohawk Packing Company is an independent organization and is managed and controlled by one Victor Borden who is not an Indian or a member of any Indian tribe.

12. During the year 1941, by oral agreement with Cleveland Jackson acting for and in behalf of said Mohawk Packing Company, the petitioners, Charles Strom and wife, sold and disposed of fish caught by them in their fishing location No. 7 to the said Mohawk Packing Company. Said oral agreement was not exclusive, however, and petitioners were under no legal obligation to sell their fish to the said Mohawk Packing Company. They did actually sell their fish, during the 1941 fishing season, to the Mohawk Packing Company which fish were bought by the said Cleveland Jackson at the going market price.

13. During the taxable year 1941 petitioners realized income from fishing operations from fishing location No. 7 on the Quinault River which they were permitted to use as follows:

Gross income from sales of			
fish to the Mohawk Pack-			
ing Company			\$5,917.29
Less: Wages paid others for			
assistance in connection			
with the spring run of			
salmon	\$1,754.52		
Wages to others for as-			
sistance in handling the			
fall run of salmon	326.87		
Miscellaneous expenses	369.20		
Truck expenses	150.00	2,600.59	
Net income realized during			
the taxable year			\$3,316.70

In his deficiency notice respondent determined that petitioners are subject to tax on the net income derived by them from fishing operations as shown above and computed an income tax thereon in the amount of \$169.67, the details of which are fully set out in the notice of deficiency, a copy of which is attached to the petition. In addition to said deficiency also asserted a 25 percent penalty thereon in the amount of \$42.42 for failure to file a return as required by law. On the basis of the facts developed and established since the deficiency notice was issued respondent now specifically waives the amount of penalty previously asserted and

makes claim only to the deficiency in tax determined in the notice of deficiency.

14. The treaty by and between the United States of America and the Quinaielt and other allied Indian tribes was entered into on July 1, 1855. A full, true and correct copy of said Treaty is hereto attached marked Joint Exhibit No. 4-D and made a part hereof. No further or different treaty by and between the United States of American and said Indian tribes has ever been entered into or consummated.

15. On November 4, 1873, the President of the United States, by executive order, created the Quinaielt reserve or Indian Reservation. A full, true and correct copy of such executive order, is hereto attached and marked Joint Exhibit No. 5-E and made a part hereof. At all times since said reservation, as shown on Joint Exhibit No. 1-A, has been and now is the reservation of the Indians covered by said treaty and by such executive order.

16. Prior to the year 1941 substantially all of said reservation lands and the timber growing thereon, were allotted to various members of said tribes. There is attached hereto marked Joint Exhibit 6-F and made a part hereof a copy of the official map of the said Indian Reservation lands showing the allotment numbers thereon.

17. Neither Charles Strom nor Flora Strom have ever received certificates of competency and at all times herein mentioned were and now are considered by the Office of Indian Affairs of the United States of America as incompetent wards of the Federal Government. By act of Congress of June 2, 1924 (43 Stat. at Large, 1923-1924, Part I p. 253 v. 233) they were and are citizens of the United States of America. The said Charles Strom has been allotted on the Quinaielt Reservation allotment No. 427 described as:

Lot 1 and the Northeast Quarter of the Northwest Quarter of Section 30, Township 23 North, Range 10, W. W. M. in Grays Harbor County, Washington, consisting of 86.20 acres,

and trust patent therefor was issued to the said Charles Strom on September 29, 1926. Flora Strom is the holder of allotment No. 322 on the Quinaielt Reservation consisting of the:

West one-half of the Southeast Quarter of Section 14, Township 23 North, Range 11, W. W. M. in Grays Harbor County, Washington, consisting of 80 acres,

and trust patent to her, covering said allotment was issued on September 29, 1926. Said allotments No. 427 and 322 are shown on Joint Exhibit No. 6-F hereto attached and made a part hereof.

18. The monies received by petitioners from

fishing operations, during the year 1941, were not taken under control by the Indian Service of the United States of America nor by any of its officials. Said petitioners had the full and unrestricted right and privilege of expending such funds as they saw fit without any supervision whatever by the officials of said Indian Agency or any other officials of the United States of America.

19. There are at present approximately 948 Indians who have Tribal rights in the various tribes to which the Quinaielt Indian Reservation has been allocated, residing outside of the reservation. Approximately 924 Indians who have such Tribal rights reside upon said reservation, according to the records of the office of the United States Indian Service and the office of the Superintendent thereof at Hoquiam, Washington. Substantially this same number existed in the year 1941 and the proportion living on and off the reservation was approximately the same.

20. The Quinaielt Indian Reservation is largely timbered. It is not adapted to grazing or to farming. Only about $\frac{1}{2}$ of 1 percent of the Indians engage in grazing or farming operations on said reservation. Most of the members of said tribe who reside upon the reservation live in the Indian village at Taholah. The Quinaielt and allied tribes residing on said reservation are known as 'fish-

eating Indians", and the principal means of livelihood of said Indians, since time immemorial, has been principally fishing and hunting. The present living members of said tribe are the descendents of the Indian tribes with whom the treaty of July 1, 1855 was made.

21. It is further agreed and understood that either party may offer at the hearing other or further evidence on the issue presented not inconsistent with the facts stipulated herein.



No. 11,383

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

CHARLES STROM AND FLORA STROM, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

SEWALL KEY,

Acting Assistant Attorney General.

J. LOUIS MONARCH,

CARLTON FOX,

Special Assistants to the Attorney General.

FILED

NOV 25 1916

PAUL P. O'BRIEN,

CLERK

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Revenue Code. (R. 3-14.) The decision of the Tax Court sustaining the deficiency (except as to the penalty which was waived) was entered March 29, 1946. (R. 39-40.) The proceeding is brought to this Court by the petition for review aforesaid, which was filed June 17, 1946 (R. 41-47), pursuant to a stipulation re venue (R. 40), under the provisions of Sections 1141 and 1142 of the Code.

QUESTION PRESENTED

Whether the taxpayers, husband and wife, who are full-blood, restricted Indians, are exempt from the payment of income taxes under the provisions of the Quinault Treaty of July 1, 1855.

STATEMENT

So far as essential here, the facts found by the Tax Court (R. 26-30) may be summarized as follows:

The taxpayers, husband and wife (although made citizens of the United States by the Act of June 2, 1924, c. 233, 43 Stat. 253), are full-blood, noncompetent, restricted Quinault Indians. They reside at the Indian village of Taholah, Washington, which is on the Quinault Reservation. (R. 26.)

In the taxable year 1941 they derived gross income from fishing operations on the Quinault River of \$5,917.29, and net income of \$3,316.70. (R. 29.)

Article II of the Quinault Treaty dated July 1, 1855, provides as follows (R. 26-27):

Article II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land

sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribe bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

In carrying out the provisions of the treaty, the President of the United States on November 4, 1873, set apart a permanent reservation. Its western boundary is the Pacific Ocean. At its eastern extremity and within the reservation is Quinault Lake. From this lake the Quinault River flows through the reservation, emptying into the Pacific Ocean in the Indian village of Taholah. Twice each year there is a run of salmon from the sea up the river to spawn in the lake. (R. 27.)

The Indians fish with gill nets set in the river. The fishing is done at certain fixed and chartered locations on the river. These are allotted periodically to certain members of the tribe by the Tribal Council, and

operations at their allotted station on the Quinault River.¹

By the treaty, the ancient fishing rights of the Quinault Tribe were reserved by the tribe, as well as confirmed in it by the Government. The treaty did not, however, expressly grant members of the tribe exemption from any tax, nor has exemption therefrom been granted them since by any federal statute.²

We believe that a negative answer to the question stated will suffice to answer in the negative three subsidiary questions posed by the taxpayers, namely, first (Br. 44-62), whether, apart from any treaty exemption, the Internal Revenue Code fails to authorize the imposition of the tax; second (Br. 63-64), whether the gain from the taxpayers' fishing operations was a capital gain, and third (Br. 64-69), whether the Government is estopped to impose the tax on income derived by them in any taxable year prior to a taxable year beginning in 1943.

¹ By the Act of June 2, 1924, c. 233, 43 Stat. 253, the Quinault Indians were made citizens of the United States, but no significance is attached to that fact here.

² Article III provides (12 Stat. 971, 972) :

"The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves."

See also *Halbert v. United States*, 283 U. S. 753, 756.

The taxpayers' contention that an affirmative answer should be given to the *first* subsidiary question, whether, assuming that there is no treaty exemption, the Internal Revenue Code itself fails to authorize the tax, rests upon the premise—which we believe to be false—that no decision expressly justifies the tax in the circumstances here; while, on the other hand, the course of administrative procedure prior to 1941, based upon certain opinions of the Attorney General, as well as upon certain court decisions and administrative rulings, justifies the view that the income in question is exempt.

The taxpayers' contention that an affirmative answer should be given to the *second* subsidiary question, whether the income in question was a capital gain for the determination of which no facts were established, rests upon the assumption that the gain was not derived from the taxpayers' fishing operations, as such, but from the sale of the fish which they caught, and which, for purposes of the argument, they presumably regard as belonging to the tribe rather than to them. The taxpayers' theory is that the tribe, as distinguished from its members, had two capital assets, both of which it and not the individual members thereof owned. One of these was the timber on the Quinault reservation, and the other the fish in the Quinault River. The fact that, in order to reduce the fish to possession, they must be caught by an individual member of the tribe, at a station assigned to him by the Tribal Council, and at his own expense, and that, when so reduced to possession, they become

were not regarded by the court as justifying the grant of an exemption from the tax to one Choteau, a competent member of the Osage Tribe, whose quantum of Indian blood was, however, not disclosed by the record, and whose income consisted of his pro rata share of the income from tribal mineral leases given with the approval of the Secretary of the Interior. As a competent Indian, Choteau had the exclusive management of his own affairs, and, as a result, had, in the court's view, assumed the same burdens that the law imposed upon every other individual owner of property. Accordingly, the court held—and this is the basis of its decision—that Choteau's civil status as thus fixed brought him within the terms of the income tax statute. The fact that the income in question was derived by him from tribal lands appears not to have been regarded by the court as in any wise determinative of the matter.

The *Choteau* case was reviewed by the Supreme Court, certiorari having been granted on Choteau's petition—and the taxability of the income in question was there affirmed. *Choteau v. Burnet, supra*. The Supreme Court stated that two contentions were made by Choteau: First, that the federal taxing statute evidenced no intent to tax him on such income; and, second, that, if its language was broad enough to do so, both his status and the nature of the income required a holding that he was exempt.

The Court rejected the first by saying that the intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income; that the taxing act did not expressly ex-

empt the sort of income there involved, or a person having Choteau's status respecting such income, and that it had been referred to no statute which did.

With regard to Choteau's contention that his status as an Indian required his exemption from the tax, the Court further said, that, aside from the fact that no treaty had any bearing on the subject, the course of legislation disclosed a plan of the Government to gradually emancipate the Indian from his former status as a ward, and that, in view of Choteau's emancipation by being declared competent, his claim that with respect to his income he was restricted, and therefore that the income was exempt, must fail.

And, in disposing of the contention that the nature of the income made it necessary to exempt it from the tax, the Court said that, while royalties received by the Government from mineral leases of Indian lands had been held to be beyond a state's taxing power (citing *Gillespie v. Oklahoma*, 257 U. S. 501 (since overruled by the Court, see footnote 9, *infra*), and *Shaw v. Oil Corp'n.*, 276 U. S. 575), on the ground that, so long as they are in possession of the United States, they are a federal instrumentality to be used to carry out a governmental purpose, it did not follow that they could not be subjected to the federal tax; and, in this connection, that the intent to exclude must definitely be expressed, where, as there, the general language of the act laying the tax was broad enough to include the subject matter (citing *Heiner v. Colonial Trust Co.*, 275 U. S. 232, as well as *Shaw v. Oil Corp'n.*, *supra*).

Thus, though the Court did not expressly refer thereto, it apparently regarded as irrelevant in the construction of the federal taxing act the rule that general laws of the United States are inapplicable to Indians, unless so expressed as clearly to manifest an intention to include them.⁴

Be that as it may, after the Supreme Court had decided the *Choteau* case, the Tenth Circuit had occasion to consider three further cases, in each of which

⁴ Incidentally, it is to be observed that the principle was referred to and relied on by the Tenth Circuit in its decision in the case involving Mary Blackbird, already referred to and decided by it with the case involving Choteau. In support, the court (38 F. 2d, p. 977) cited *Elk v. Wilkins*, 112 U. S. 94, 100, together also with *Choate v. Trapp*, 224 U. S. 665, for the corollary principle, that, while exemptions from taxation are to be strictly construed, the rule is different as regards statutes exempting Indians from taxation. See also *Carpenter v. Shaw*, 280 U. S. 363. On the other hand, this rule has apparently been considered by the Supreme Court as being inapplicable to a state tax upon leaseholders of lands belonging to a restricted Indian, measured by the percentage of the gross value of oil and gas produced. The land in question belonged to a non-Indian citizen of Oklahoma and was then subject to state taxation. But it had been purchased by the Secretary of the Interior for a minor full-blood Creek Indian, with money derived as royalties from a departmental lease of his restricted allotment. Subsequently the land was let for oil and gas exploitation under a departmental lease and the tax was levied on the leaseholders. *Shaw v. Oil Corp'n*, already cited in the text, *supra* (276 U. S. 575). Furthermore, in *Superintendent v. Commissioner*, 295 U. S. 418, 421, hereinafter more fully discussed in the text, the Court said that general exemption from the tax (such as was involved in *Carpenter v. Shaw*, *supra*), related, in any event, only to land and not to income derived by a full-blood, restricted Indian from investment of his surplus income from the land. The rule, however, seems to be different as regards a state inheritance tax levied in respect of the passage of restricted Indian lands at and as a result of the Indian owner's death. *Oklahoma Tax Comm'n v. United States*, 319 U. S. 598, 611.

it undertook to apply what it considered to be the rule in that case to a different state of facts. These cases are *Bagby v. United States*, 60 F. 2d 80; *Pittman v. Commissioner*, 64 F. 2d 74; *Superintendent Five C. Tribes, Etc. v. Commissioner*, 75 F. 2d 183, being the second Tenth Circuit case to be reviewed by the Supreme Court.

In the meantime, the then General Counsel of the Bureau of Internal Revenue had undertaken to construe the Supreme Court's decision in the *Choteau* case and had concluded that the Court had therein drawn the dividing line between the original restricted *allottee* lands of the Five Civilized Tribes and new acquisitions of property for a restricted allottee member thereof. Accordingly, the General Counsel concluded that income, even if of a restricted Indian, from his reinvestments by the Interior Department of income from tax-exempt, restricted, allotted lands was taxable to the same extent as the investment income of other residents of the United States; but that such case was to be distinguished from the *Blackbird* case, as he regarded that case to be modified in effect by the decision of the Supreme Court in the *Choteau* case, on the ground that substantially all of the income involved in the *Blackbird* case was derived from the original tribal property or from restricted allotted lands. In this connection, the General Counsel said that the status of reinvestment income had not been considered in that case. See G. C. M. 9621, X-2 Cum. Bull. 111 (1931). It is to be noted that this ruling was referred to and relied on by the Tenth Circuit in the *Superintendent Five C. Tribes, Etc.* case. *supra*, p. 184

and that it is also cited by the taxpayers in their brief (p. 56).⁵

The application of the Supreme Court's decision to the facts in the *Bagby* and *Pittman* cases appears to have given the Tenth Circuit no great difficulty. The *Bagby* case involved income from an oil and gas lease in the form of royalties upon the surplus allotments of a minor, one-sixteenth blood, Creek Indian. By the applicable Act of Congress, the allotments in question were unrestricted and subject to taxation, because owned by an Indian of mixed blood having less than one-half Indian blood. The decision of the court proceeded upon the narrow ground that the removal of the restriction upon the alienation of the property from which the income was derived justified the imposition of the federal income tax, and that, in these circumstances, it clearly appeared from that Act, as also from the Revenue Act of 1918, that Congress intended to subject the income to the tax.

Similarly, in the *Pittman* case, the Tenth Circuit

⁵ What the taxpayers fail to point out, however, is that, after the decision of the Supreme Court in *Superintendent v. Commissioner*, *supra*, this ruling was corrected by the General Counsel to conform therewith. See G. C. M. 16020, XV-1 Cum. Bull. 78 (1936), and G. C. M. 16100, *id.*, p. 80, which broadened administrative practice to subject to the income tax not only so-called investment income of restricted Osage Indians, but rents, royalties and bonuses derived by them from mineral leases of the tribe, although the ruling still held exempt from the tax income derived from the homestead allotments of restricted Osage Indians, because made inalienable and nontaxable by the Osage Act of 1906, c. 3572, 34 Stat. 539. Of course, these rulings do not visualize the situation here presented, and nothing in them can be regarded as dispositive of the taxpayers' liability here.

held, on the authority of its own decision in the *Bagby* case (the Supreme Court's decision in the *Choteau* case not being expressly mentioned), that whether allotted lands, and therefore the income therefrom, became subject to taxation on passing by inheritance from a one-half blood Indian (in whose hands all but an allotted homestead was free from restrictions), to a full-blood Indian, must be determined from a construction of the applicable provisions of the governing Act of Congress. The court therefore held that, since all property, except the decedent's homestead, came into the possession of his heir unrestricted, none, except the homestead, was exempt from taxation. Accordingly, the court concluded that all the income derived therefrom, except that derived from the homestead, was subject to the tax.

However, the case of *Superintendent Five C. Tribes, Etc. v. Commissioner, supra* (affirmed by the Supreme Court in *Superintendent v. Commissioner, supra*, as stated), gave the Tenth Circuit more difficulty, being decided by it by a divided court, Judge Lewis who had written the opinion in the *Choteau* case dissenting. The court stated the question in the case to be whether the income of a minor, restricted Indian, derived from investments made by his guardian with income from his ward's allotment, is subject to the federal income tax. The majority of the court accepted as datum its decision in the *Blackbird* case that income received by a minor, restricted Indian from his allotment, as well as income received by him from tribal property held in trust for him,

was *not* subject to the federal income tax.⁶ On the other hand, it also accepted as datum certain Supreme Court and Circuit Court of Appeals decisions, which it cited, and which are set out in the margin,⁷ that lands purchased for investment from such savings, although restricted, were subject to *state* taxation.

Proceeding on the premise that, in the *Choteau* case, the Supreme Court "disclaimed" an intent to pass upon the taxability of an incompetent Indian—whereas that Court had only said (283 U. S. 695) that it was not concerned therewith in that case—the Tenth Circuit (75 F. 2d, p. 185) concluded, from a review of its decisions in the *Blackbird* and *Choteau* cases, as well as from a review of the subsequent decision of the Supreme Court in the *Choteau* case and its own decision in the *Pittman* case, which followed the *Choteau* case, that these decisions supported the conclusion that a full-blood Indian was an individual embraced in the term "every individual" as used in the federal taxing statute, and that such exemption from taxation as he enjoyed arose not from his blood or race, but from the nature of the property giving

⁶ Still later, but before the decision of the Supreme Court affirming the *Superintendent Five C. Tribes* case, the Tenth Circuit took a similar view in *Dick v. Commissioner*, 76 F. 2d 265, in which the question whether Congress intended to tax restricted Indians was only incidentally involved, but the court stated that the matter was only one of intent and not of power, citing the Supreme Court's decision in the *Choteau* case and its own decisions in the *Pittman* and *Superintendent Five C. Tribes* cases.

⁷ *Shaw v. Oil Corp'n*, 276 U. S. 575; *United States v. Ransom*, 284 Fed. 108 (C. C. A. 8th), affirmed 263 U. S. 691; *United States v. Gray*, 284 Fed. 103 (C. C. A. 8th), and *United States v. Mumert*, 15 F. 2d 926 (C. C. A. 8th).

rise to the income. In this connection, the court observed that, in the cases so far considered, the property from which the taxable income was derived was *unrestricted* and therefore subject to taxation. On the other hand, the court said, that in the case before it, the property giving rise to the income was restricted, as was the income itself. Thus it considered that the question presented was whether the fact that the land was restricted exempted it from taxation. It stated that this question had not been answered so far as federal taxes were concerned, although it had conclusively been answered as to state taxes, reference being to cases cited in footnote 7, *supra*. That being so, the court concluded (p. 186) that, if Congress intended such investments as were involved in the case to be subject to state taxation, it could see no reason for holding that it intended to exempt the income therefrom from federal taxation. In the court's view, it followed that the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to the federal income tax, although the property giving rise thereto was restricted. See also *Dick v. Commissioner*, 76 F. 2d 265 (C. C. A. 10th).

It is thus apparent that, while the Tenth Circuit had broadened its concept of federal taxation of Indians, it was still giving a wide berth to the proposition that the imposition of the income tax depended neither upon the Indian's status, nor upon that of his property or the income derived therefrom, but only upon the answer to the simple question whether he

had derived income not expressly exempt from the tax by treaty, or by some statute other than the income tax act, for the latter did not serve to do so. The dissenting opinion of Judge Lewis but serves to emphasize this fact, for it is pitched upon the proposition that, contrary to the view of the majority of the Court, under its decisions in the *Bagby*, *Pittman* and *Choteau* cases, and particularly under its decisions in the *Bagby* case, the restriction of the Indian or his property necessarily implied a Congressional intent to exempt from the tax both him and his property, as well as the income derived therefrom. Of course, the Supreme Court had then not expressly pointed out, as it did later on review of the case, in *Superintendent v. Commissioner* (295 U. S., p. 420), already referred to and about to be discussed, that it was erroneous to suppose "inalienability and nontaxability go hand in hand."

However, it is in the light of the Tenth Circuit's view of the *Superintendent Five C. Tribes* case that its affirmance by the Supreme Court must be read; for a perusal of the Supreme Court's decision therein can lead to but one conclusion, namely, that in affirming the case, the Court completely rejected the basis upon which the lower court had decided it, and that, as we have indicated, it grounded its affirmance upon the broad principle that no Indian, whatever his status, or his income, from whatever source derived and whether restricted or not, is exempt from the income tax unless such exemption is expressly granted to him or to his income by some other Act of Congress, or perchance by treaty.

3. *The Rationale of the Supreme Court's decision in the case of SUPERINTENDENT v. COMMISSIONER.*—The Supreme Court briefly stated the facts in *Superintendent v. Commissioner, supra* (295 U. S. 418), to be that Sandy Fox, for whom the suit was instituted, was a full-blood Indian; that certain funds derived from his restricted allotment, in excess of his needs, had been invested, and that the proceeds thereof (i. e., the income therefrom) were collected and held in trust for him. The Court stated the question on these facts to be whether this income was subject to the tax. It then pointed out that the Superintendent maintained the court below should have followed the rule which it had applied in the *Blackbird* case, and also that it erroneously held Congress intended to tax income derived from the investment of funds arising from restricted lands belonging to a full-blood Indian.

Quoting that part of the Tenth Circuit's decision in the *Blackbird* case, upon which that court had rested its conclusion that Mary Blackbird, a restricted full-blood Osage, was not subject to the tax, as follows (p. 419):

Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects "the net income of every individual" to the tax, this is alone sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the

subject affected by legislation they have been named and their interests specifically dealt with.

the Supreme Court categorically said (p. 419):

This does not harmonize with what we said in *Choteau v. Burnet*, 283 U. S. 691, 693-696.

The Court then quoted the language it had used in the *Choteau* case, to the effect that Congress intended to levy the tax with respect to all residents of the United States and upon all sorts of income; that the Act did not expressly exempt the sort of income therein involved, or a person having Choteau's status, and that it was referred to no other act which did, and that the intent to exclude must be definitely expressed where, as in that case, the language of the act laying the tax was broad enough to include the subject matter.

The Court also dismissed the Superintendent's contention, to which we have already referred, that "in-alienability and the nontaxability go hand in hand," and that it was not likely to be assumed Congress intended to tax the ward for the benefit of the guardian, by again pointing out (p. 420) that the terms of the taxing statute included the income under consideration, and, if exemption existed "it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs."

And, finally, in disposing of the Superintendent's suggestion that exemption must be inferred from the Act of April 26, 1906, c. 1876, 34 Stat. 137, which not only extended the restriction upon alienation of allotments, but provided for their exemption from

taxation, the Court said (p. 421), that such exemption related to land and not "to income derived from investment of surplus income from land." Incidentally the Tenth Circuit appears now to have accepted that view. See *Landman v. Commissioner*, 123 F. 2d 787, 790, certiorari denied, 315 U. S. 810.⁸

We do not regard the last-quoted language as intended to restrict the tax to income derived from investment of surplus income. For, so restricted, it would gloss the broad basis of the decision, that, barring an express exemption by treaty or by an Act of Congress dealing with Indians and their property, the income tax applies to them, whatever their status, as well as to their property, regardless of whether it was restricted or not, including their income, from whatever source derived, and precisely in the same

⁸ Cf. *Oklahoma Tax Comm'n v. United States*, 319 U. S. 598, affirming a holding of the Tenth Circuit (131 F. 2d 635) that the Oklahoma inheritance tax was inapplicable to the passage at death of restricted Indian lands. The Supreme Court's affirmance, however, proceeded upon the ground that an express exemption from taxation of the lands—by the State of Oklahoma—was controlling. Since then, the Court of Claims has held, on the supposed authority of the Supreme Court's decision in the *Oklahoma Tax Comm'n* case, that the passage of such property is immune from the federal estate tax, on the theory that the two taxes are substantially similar, although, concededly, there was no express exemption from the lands from any federal tax. Furthermore, the Court of Claims appears to have disregarded the apparent approval by the Supreme Court (p. 608) of the Tenth Circuit's decision in *Landman v. Commissioner*, cited in the text, *supra*. *Landman v. United States*, 58 F. Supp. 836. It should be noted that the Solicitor General's decision not to apply for certiorari in this case was not predicated on an acceptance of the validity of the decision, or on the assumption that it was not in conflict with the Tenth Circuit's decision in *Landman v. Commissioner*, *supra* (123 F. 2d 787).

manner and to the same extent as the tax applies to other residents of the United States, their property and income, not expressly exempt.⁹

In any case, the taxpayers here can get no comfort from a possible contrary conclusion; for, as has already been stated, their income was not derived from restricted property, or even from property acquired for them by surplus income from restricted property. It was derived from what to all intents and purposes was a commercial fishing operation, carried on by them and involving the payment by them of such ordinary and necessary expenses as are usually incurred in connection with such operations.

We therefore submit not only that the decision of the Supreme Court in *Superintendent v. Commissioner*, but the apparently broad scope of its decision in *Choteau v. Burnet*, sustains the tax here, unless, indeed, the Quinault Treaty exempts either the taxpayers themselves, or the income they derived from their fishing operations, from the tax. Of course, as stated, there is no Act of Congress which does, and the taxpayers do not claim that there is.

⁹ Moreover, as the Court pointed out in *Oklahoma Tax Comm'n, supra* (see footnote 8), the doctrine of constitutional immunity from taxation for the income of the Indian's holdings on the federal instrumentality theory has been renounced in *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, which, as the Court said, in effect overruled *Childers v. Beaver*, 270 U. S. 555. It is to be noted that *Helvering v. Mountain Producers Corp.*, *supra*, p. 387, also overruled *Gillespie v. Oklahoma*, 257 U. S. 501, where the immunity of income from the state income tax was attributed to the exemption therefrom of the property from which the income was derived, though, as indicated, in the *Oklahoma Tax Comm'n* case, the Supreme Court has refused to extend this rule to state inheritance taxes. See footnote 8, *supra*.

4. *There is no Exemption From The Tax in the Quinault Treaty.*—A mere reading of ~~Article III of~~ the Quinault Treaty (12 Stat. 971) is sufficient to show that there is no such exemption therein. There could hardly have been, for up to the time the treaty was made there was no federal income tax; and so far as we are aware, no federal tax which could affect these Indians, at least as regards their fishing operations. We again refer to this hereafter. It is, moreover, significant that, when an income tax was imposed, no exemption was granted them, either by the Act itself, or by an act dealing with them and their affairs.

It is not a fair inference that the treaty, nevertheless, was intended to exempt them, or their income, from the tax, or that it served to do so. It is not helpful here to say that the treaty should be construed as the Indians understood it, and that all doubts must be solved in their favor. To be sure that is the way it should be construed. So construed, however, the treaty, at best, merely assured the Indians that no restrictions or conditions would be imposed upon their ancient and reserved rights to fish, except those imposed by the treaty itself, which included the right of others to fish at their accustomed places.

For, as the Court pointed out in *Shoshone Indians v. United States*, 324 U. S. 335, 353, the rule of construction referred to means no more than that the language should be construed in accordance with the tenor of the treaty. Moreover, the Court said that

this is the meaning of the other cases which the petitioners in that case cited upon the point, among which are *United States v. Winans*, 198 U. S. 371, 380; *United States v. Payne*, 264 U. S. 446, 448-449; *Seufert Bros. Co. v. United States*, 249 U. S. 194, 198, and *Tulee v. Washington*, 315 U. S. 681, upon all of which the taxpayers here rely in support of their contention that a reservation of an exemption from the income tax upon the income derived from their fishing operations should be read into the treaty, in order to avoid what would otherwise be an injustice to them. Answering a similar contention made on behalf of the Indians, the Court, in the *Shoshone Indians* case, went on to say (*loc. cit.*) that, while it attempts to determine what the parties meant by the treaty, it stopped short of varying its terms to meet alleged injustices; that such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress, citing *United States v. Choctaw Nation*, 179 U. S. 494, 534-536, and *Choctaw Nation v. United States*, 318 U. S. 423, 432.

Of course, no act by non-Indians, such as the exercise by others than Indians of the right to fish, would, in view of the treaty, be permitted, in effect, to destroy the fishing rights which the Indians had reserved in the treaty. See *United States v. Winans*, *supra*; *Seufert Bros. Co. v. United States*, *supra*. Indeed, it is this principle which underlies the decision of the Supreme Court in *Tulee v. Washington*, *supra*, wherein the Court denied the State of Washington the right to impose, as a condition to the exercise of

such right, the payment of a license fee, even though it was small and fair, and was levied, at least in part, as an incident to the state's power to regulate fishing within its boundaries, which concededly extended to fishing by Yakima Indians, there involved. It is apparent that the *Tulee* case is so far removed from the principles involved in *Choteau v. Burnet* and *Superintendent v. Commissioner, supra*, that the citation of neither was deemed by the Court to have been required, even in passing, in the *Toulee* case.

A similar conclusion to that reached by the Supreme Court in the *Tulee* case had theretofore been reached by the United States District Court for the Western District of Washington in *Mason v. Sams*, 5 F. 2d 225, which involved an attempt by the Commissioner of Indian Affairs and the Secretary of the Interior to regulate the fishing operations of the Quinault Indians, and in that connection to impose upon them a fee, which the regulations denominated a "royalty," to be used for the support of aged and destitute members of the tribe. Such royalty was to be measured by receipts. The imposition of the fee upon the fisherman Indian was attempted to be justified on the theory that the fishing rights belonged to the tribe, and that only a comparatively small number of the members thereof could be assigned to fishing locations. We apprehend that, had the Tribal Council made the regulations, they would not have been objectionable, and the charge of the fee, however measured, would not have been subject to attack on the ground that it did not have the power to impose a

charge of that sort. The point is that the basic objection to the regulations was not that Congress had no power to authorize the Commissioner and Secretary to make them, or that, had it done so, they were unreasonable, but that, absent such authorization, the Commissioner and the Secretary had no such power. Thus the District Court stated the question to be whether, under the applicable treaty and laws, the Commissioner and Secretary had the "discretion" to make the regulations, observing that, if they did, they were necessary parties and the bill should be dismissed, though it need not be dismissed if they had no such discretion. Accordingly, the court denied the motion to dismiss because it concluded that they had no such discretion.

There is, therefore, nothing which justifies an assumption that the principles laid down by the Supreme Court in *Choteau v. Burnet* and *Superintendent v. Commissioner* were in any wise intended to be qualified by its decision in the *Tulee* case. It follows that, since there is no express exemption from the tax in the Quinault Treaty, or even one necessarily to be implied therefrom, and none in any Act of Congress, the taxpayers are subject to the tax.

This conclusion is in no wise impaired by the taxpayers' reference (Br. 32) to Chief Justice Marshall's dictum in *McCulloch v. Maryland*, 4 Wheat. 316, 341, that "the power to tax involves the power to destroy." Aside from the fact that the soundness of this "flourish of rhetoric" has sometimes been brought into question (see, e. g., Mr. Justice Frankfurter's concurring

opinion in *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 488-490), it does not admit of doubt that Congress has the power to impose the income tax on the Indian in the same manner and to the same extent as it is imposed upon any other resident of the United States. Indeed, the taxpayers admit the power, claiming only that it has been renounced in the Quinault Treaty. They do not, however, claim that it has been expressly renounced therein. But, if Congress had intended to renounce the power, it seems clear that it would have done so expressly. And, since there was no federal internal revenue law in force at the time the treaty was made—none having been imposed for a period of 43 years from 1818 to 1861—there was no occasion to exempt the Indian therefrom, either by treaty or by statute dealing with their affairs.¹⁰

In any case, immunity can no more be made to rest on treaty implication than it can be made to rest upon statutory implication. *Superintendent v. Commissioner*, *supra*; *Oklahoma Tax Comm'n v. United States*, *supra*. Moreover, the tax here in question was not designed to destroy the taxpayers' fishing rights. It will be time enough to consider the power of Congress to destroy them by a tax when it undertakes to impose one designed to do so. See *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716, 731.

¹⁰ It is to be noted that at the time the treaty was made all property of Indians was expressly exempt by the Laws of the Territory of Washington from the only tax which could have been applied to them. See Statutes of the Territory of Washington, Being the Code Passed by the Legislative Assembly at Their First Session Begun and Held at Olympia, February 27, 1854, pp. 331-332.

CONCLUSION

For the reasons stated the decision of the Tax Court should be affirmed.

Respectfully submitted.

SEWALL KEY,

Acting Assistant Attorney General.

J. LOUIS MONARCH,

CARLTON FOX,

Special Assistants to the Attorney General.

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